Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1997

TOM BATES, ET AL.,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether California's legislative term limits violate the First and Fourteenth Amendments by prohibiting voters who desire experienced candidates from voting for such candidates, while permitting those who prefer relative novices to do so, and by excluding experienced candidates in order to advantage newcomers and purportedly to increase representation by minorities.

2. Whether California's legislative term limits violate the First and Fourteenth Amendment rights of voters by preventing voters who have been successful in selecting a candidate for the State Assembly or Senate from exercising that same right in the future.

3. Whether, after a trial in which the testimony of every witness, including voters, legislators, candidates and academic experts for all parties, demonstrated that California's term limits are not narrowly tailored to achieve any asserted state interest, the district court erred in striking down as violative of the First and Fourteenth Amendments legislative term limits that impose a lifetime ban on further service in the California Assembly after six years and in the California Senate after eight years.

4. Whether an initiative to amend California's Constitution by prohibiting voters from choosing experienced candidates failed to provide constitutionally adequate notice to the voters that candidates would be barred for life from further service where 1) the California Supreme

QUESTIONS PRESENTED FOR REVIEW – Continued

Court found the measure "ambiguous" on that point; and 2) California's Attorney General was of the opinion that no lifetime ban was imposed.

PARTIES TO THE PROCEEDING

The parties to the Court of Appeals proceedings are the following:

Petitioners:

Tom Bates, Edward H. Lyman, Richard Sterling, Ardis Graham, Richard D. Lewis, Lawrence J. Buchalter, Jonathan Browning, Rachel Sherman, Martha Escutia, Sylvia Hernandez, Ana Rosa Pena, Claudia Navar, Barbara J. Friedman, Susan Zarakov, Harriet Sculley

Kenneth L. Maddy, Donald A. Jackson, Ruben S. Ayala, Sondra J. Elrod, David Gonzalez, Louis B. Medina, Charles M. Calderon, Philip Pace, Leroy F. Greene, Alex F. Ives, Teresa P. Hughes, Mary Lou Cataño, Bill Lockyer, Mary Robin Torello, Henry J. Mello, Helen A. Mello, Herschel Rosenthal, Steven Parker, Mike Thompson, Mel Varrelman, Diane E. Watson, Anna L. Gonzales, Valerie K. Brown, Doris Elaine Lowe, Cruz M. Bustamante, Lawrence Aldrete, Denise M. Ducheny, Verna Quinn, Martin Gallegos, Christopher Kakimi, Diane Martinez, Ruth M. Willner, Kerry Mazzoni, Phillip B. Raful, Kevin Murray, Laura Dixon, Lisa Dixon, Marc Pryor, Grace F. Napolitano, Robert L. Henderson, Don Perata, Penny L. Stanley, Roderick D. Wright, and Ruby Maillian

Respondents:

Bill Jones, Secretary of State of California; Bradley J. Clark, Alameda County Registrar of Voters; Conny McCormack, Los Angeles County Registrar of Voters

Peter F. Schabarum and Lewis K. Uhler

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tom Bates, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc panel of the Ninth Circuit Court of Appeals (Appendix 1-76) is reported at ___ F.3d ___, 97 C.D.O.S. 9535, 1997 WL 799079 (Dec. 19, 1997). The opinion of the three-judge panel of the Ninth Circuit (App. 77-143) is reported at 127 F.3d 839. The opinion of the District Court (App. 144-200) is reported at 958 F. Supp. 1446.

JURISDICTION

The Court of Appeals entered its judgment on December 19, 1997. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

> or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The California Constitution, article IV, section 2(a) provides:

> The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years. No Senator may serve more than 2 terms.
>
> The Assembly has a membership of 80 members elected for 2-year terms. No member of the Assembly may serve more than 3 terms.
>
> Their terms shall commence on the first Monday in December next following their election.

STATEMENT OF THE CASE

On November 6, 1990, California voters approved Proposition 140, an initiative measure that reduced the Legislature's budget by thirty-eight percent, cut legislators' retirement benefits, and imposed term limits on

legislative and executive service. App. 217-22. Because the legislative term limits were not retroactive, they did not exclude candidates from the ballot until 1996. Cal. Const. art. XX, § 7; App. 221.

Immediately after passage of Proposition 140, the California Legislature and a number of individuals brought an original action in the California Supreme Court challenging the measure largely on the basis of the state Constitution. *Legislature v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309 (1991), *cert. denied*, 503 U.S. 919 (1992). Among the issues in that case was a claim by certain legislators and voters that Proposition 140's term limits violate the First and Fourteenth Amendments. 54 Cal. 3d at 514, 816 P.2d at 1322. The California Supreme Court rejected the First Amendment claim, but acknowledged that "it is presently unclear under federal law whether and to what extent voters retain a constitutional right to vote for particular candidates such as the incumbent legislators affected by the challenged measure." 54 Cal. 3d at 519, 816 P.2d at 1325. The court concluded that under federal law, "the *legal* impact of Proposition 140 on the voters remains uncertain." *Id.* (emphasis in original).

In the course of its decision, the California Supreme Court interpreted Proposition 140 to impose a lifetime ban rather than a limitation on consecutive terms. 54 Cal. 3d at 506, 816 P.2d at 1316. Thus, under the measure as interpreted by the California Supreme Court, an Assemblymember is precluded from any further service in the Assembly after three two-year terms (six years), and a state Senator is precluded from any further service in the Senate after two four-year terms (eight years).

In July 1995, as preparations for the 1996 elections approached, Assemblymember Tom Bates and three voters who supported his reelection challenged the legislative term limits in federal district court based on the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The federal district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

The trial court denied plaintiffs' motion for a preliminary injunction, and the 1996 elections went forward with Tom Bates excluded from running. *Bates v. Jones*, 904 F. Supp. 1080, 1098 (N.D. Cal. 1995). Subsequently, in the trial court and on appeal, other state legislators and their supporters joined the suit as plaintiffs. Thus, petitioners include twenty-three current or former legislators who will be precluded from running for the state Assembly or Senate based upon their prior service, as well as voters who support their reelection.

After a full trial, the District Court, on April 23, 1997, entered its judgment ruling California's legislative term limits unconstitutional. App. 144-45. The District Court ruled that the lifetime ban on legislative service after three two-year terms in the Assembly and two four-year terms in the Senate imposed a severe burden on the right to vote and was not narrowly tailored to serve the interests articulated by the state. App. 150.

On October 7, 1997, after expedited consideration, a three-judge panel of the Ninth Circuit issued its decision affirming the District Court's judgment on the ground that California voters did not have adequate notice that they were enacting a lifetime ban. App. 79, 127-28. One judge dissented. App. 129-43.

On November 4, 1997, a majority of the active judges of the Ninth Circuit voted to rehear the case en banc. *Bates v. Jones*, 129 F.3d 494 (9th Cir. 1997). The en banc decision, issued December 19, 1997, reversed the panel and the District Court. App. 3. A majority of the court found that the lifetime ban had a "minimal impact" on the right to vote and that it was justified by the state's "legitimate" interest in reducing incumbent advantages. App. 9. A majority of the court also concluded that the voters had sufficient notice that Proposition 140 imposed a lifetime ban on legislative service. App. 7.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to review a decision of the Ninth Circuit Court of Appeals which has trivialized what is perhaps the most important political issue of this decade and certainly the most important conflict between the Fourteenth and Tenth Amendments that the federal courts have had to resolve since *Baker v. Carr.*[1]

The issue is term limits – not just any term limits, but term limits that apply to state legislators and that ban them for life from running for the California Assembly or Senate once they have served their allotted terms.

In California, as in most states, the point of contact between citizens and their state government is their elected Assemblymember or Senator. It is to these legislators that Californians turn when they see a wrong that

[1] 369 U.S. 186 (1962).

must be righted. It is these legislators upon whom Californians count to speak up for their interests in Sacramento. It is these legislators who help them with an intransigent and unresponsive bureaucracy.

These are not term limits for a Governor who takes office beholden to no particular district and who has immediately at his or her command the entire resources of the executive branch and vast influence over the legislative and judicial branches. These are term limits for those who must speak for their constituents, master the intricacies of legislative and state politics, and find ways to forge consensus among 120 disparate representatives and factions.

Nor are these just any legislative term limits. They are the most restrictive in the nation, forcing Assemblymembers out of office after six years of service and Senators out after eight. Of the twenty-one states that impose term limits, none imposes a shorter period of service. *See Bates v. Jones*, 958 F. Supp. 1446, 1454 n.5 (N.D. Cal. 1997); App. 154-55 n.5. And even though California's limits were passed on the premise that they were needed to reduce the power of incumbency, they bar each of the legislative plaintiffs for life after their term limits have been reached. *Id.*

For nearly 150 years, California legislators have been accountable to the voters every two years for the Assembly and every four for the Senate. That accountability continues, but once their allotted terms are up, they cannot run again, no matter how much their constituents may want them to. Unlike age requirements, or residency or citizenship requirements, the disability that attaches to

a termed out legislator and her constituents is immutable. There is nothing she can do, no matter how hard she works or how deep her support is, to earn another term.

A. The Constitutional Conflict Presented Here Has Nationwide Significance and Calls for Resolution by the Highest Court

When this Court considered the constitutionality of federal term limits in *U.S. Term Limits, Inc. v. Thornton*,[2] it recognized the immense historical significance of term limits and of the role that legislative representatives play in the life of this nation. Although the constitutional issues underlying this challenge bring the Fourteenth Amendment into play, rather than the Qualifications Clause, in both cases the relationship between the governed and their representatives is the same. The Ninth Circuit dismissed that relationship in an opinion that will span barely a page of the Federal Reporter, holding that a lifetime ban on future service "is a neutral candidacy qualification, such as age or residence." App. 8. Insisting that term limits "make[] no distinction on the basis of the content of protected expression, party affiliation or inherently arbitrary factors such as race, religion or gender," the court concluded that the burden on First Amendment rights imposed by lifetime term limits is "minimal." App. 9.

Whatever the ultimate outcome of the substantial conflict between the voting rights protections of the First and Fourteenth Amendments on the one hand and the

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[2] 514 U.S. 779 (1995).

Tenth Amendment on the other, Californians are entitled to a far more serious look at these issues of national significance. The Ninth Circuit's dismissal of the burden of term limits as minimal cannot be squared with this Court's treatment of federal term limits, limits that have the same effect on federal voters as state limits have on state voters. This Court left no doubt as to the severity of the impact of term limits on voters. In a section of the majority opinion titled "Democratic Principles," the Court began:

> Our conclusion that States lack the power to impose qualifications [for Congress] vindicates the same "fundamental principle of our representative democracy" that we recognized in *Powell*, namely that "the people should choose whom they please to govern them."
>
> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 819 (1995), *quoting Powell v. McCormack*, 395 U.S. 486, 547 (1969).

Twice the Court quoted Robert Livingston's argument against term limits during the ratification debates in the Legislature of New York:

> "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights. This rotation is an absurd species of ostracism."
>
> *Id.* at 813-14, *quoting* 2 Elliot's Debates 292-93. *See also id.* at 794-95.

The issue of state legislative term limits frames in stark relief the extent to which a state may limit its voters' choices at the ballot box. Whether or not states have the right to impose restrictions on what this Court has labeled "basic principles of our democracy"[3] is something only this Court can finally decide. As Justice Kennedy put it with respect to congressional term limits, the issue is whether a state

> can burden the rights of resident voters in federal elections by reason of the manner in which they earlier had exercised it. If the majority of the voters had been successful in selecting a candidate, they would be penalized from exercising that same right in the future.
>
> 514 U.S. at 844 (1995) (Kennedy, J., concurring).

This case affects not only the relationship between California's thirty-three million people and their elected representatives. It also directly affects the voters and candidates of the states of Oregon[4] and Nevada, which have enacted lifetime bans, and Arizona, Montana, Washington and Idaho, which have enacted consecutive term limits. In addition, the decision will greatly influence, if not control, the analysis of term limits in the states of Arkansas, Michigan, Missouri and Oklahoma, each of

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[3] 514 U.S. at 831.

[4] Shortly before the en banc decision below, the United States District Court for the District of Oregon struck down Oregon's lifetime legislative term limits on grounds substantially similar to those relied upon by the district in this case. *Markham v. Keisling*, No. 97-6237-TC (D.C. Or., filed Dec. 16, 1997).

which also has a lifetime ban after a short period of legislative service, and in the ten remaining consecutive term limit states as well. *See Bates v. Jones*, 958 F. Supp. 1446, 1454 n.5 (N.D.Cal. 1997); App. 154-55 n.5.

This Court granted certiorari in *U.S. Term Limits, Inc. v. Thornton*, despite "striking unanimity"[5] among the state and federal courts that had considered term limits for federal legislators. The Court then further developed important issues regarding the meaning of federal citizenship, the application of the Qualifications Clause, the import of its ballot access procedural cases, and the impact of term limits on the right to vote and to be a candidate. As is the case here, there was not at the time a conflict among the circuits, but the issue was one that deserved to be decided by this Court.

The issue here carries equivalent weight, because it tenders the relationship between protection of the rights of individuals, acting for themselves and collectively, to elect their representatives and the powers reserved to the states after the Fourteenth Amendment. Like the seminal *Slaughter-House Cases*[6] and those that followed, this case also tenders the issue of the appropriate role of the federal judiciary in resolving such conflicts. It asks not only whether the right in question – to choose the representative of one's choice – is entitled to constitutional protection, but also alternatively, whether, in this case, term limits make distinctions based on class, treating some

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[5] 514 U.S. at 798.

[6] 83 U.S. (16 Wall.) 36 (1873).

voters unequally, with respect to the exercise of the most fundamental right in a democracy.

B. The Ninth Circuit's Opinion Directly Contradicts Supreme Court Precedent, With Far-Reaching Consequences

The Ninth Circuit's casual treatment of the burden imposed on California's voters creates jurisprudential problems that go far beyond the issue of term limits. By dismissing the burden as "minimal," the court ended the required Fourteenth Amendment inquiry before it ever started. The required analysis is set forth in *Burdick v. Takushi*, 504 U.S. 428 (1992), where the Court explained that "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* at 434. If the burden is severe, then traditional strict scrutiny applies:

> Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance."
>
> *Id., quoting Norman v. Reed*, 502 U.S. 279, 289 (1992).

If the law imposes only " 'reasonable, nondiscriminatory restrictions' " upon the right to vote, then " 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.*, quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

It is difficult if not impossible to reconcile this Court's recognition of the "fundamental principle of our

representative democracy" that the people have a right to "choose whom they please to govern them"[7] with the Ninth Circuit's approach to that principle in *Bates v. Jones*. The Ninth Circuit held that California's term limits do not " 'limit[] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.' " App. 9. This comes as a surprise to plaintiff Larry Buchalter and other disability rights advocates whose causes plaintiff Tom Bates advocated in the California Assembly for years and who can no longer associate to support his candidacy precisely because they and others have successfully supported him in the past. *See Bates v. Jones*, 958 F. Supp. 1446, 1456 (N.D. Cal. 1997); App. 160-61. To them and to the thousands of others who have voted for Tom Bates over the years, the impact on their associational and voting rights is severe. As the district court found:

> Term limits, however, are not politically neutral. They are a determination by the majority that one trait, legislative experience, is undesirable and that all voters should be prohibited from voting for candidates possessing that trait. A significant minority of voters are therefore absolutely precluded from expressing their political preference for experienced legislators when voting for their State representatives.
>
> App. 169.

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[7] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. at 819, *quoting Powell v. McCormack*, 395 U.S. at 547.

The Ninth Circuit's rationale invites continuing distortion of First Amendment jurisprudence not only in term limits cases, but in any case in which the state asserts a right to restrict ballot access. If one can say that term limits do not burden the right of voters because they have no right to vote for a particular candidate to represent them in the Legislature, why could a state not prohibit lawyers from running for office as well? Such a restriction would not be based on political affiliation or ideology. All lawyers would be prohibited. It would thus be no more discriminatory than saying that all experienced legislators are prohibited. Under the Ninth Circuit's reasoning, a state could bar a candidate who has served two or three legislative terms from running for any other public office for life, or it could mandate that its legislature be composed only of those who have college degrees, or for that matter, only of those who do not.

In fact, of course, the burden of term limits on voters like these is clearly more severe than burdens that have consistently been struck down by this Court.[8] Moreover,

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[8] *See Norman v. Reed*, 502 U.S. 279 (1992) (invalidating 25,000 voter signature requirement for new political party to field candidates); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (invalidating Ohio statute requiring an independent candidate for President to file early statement of candidacy in order to appear on general election ballot); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (invalidating signature requirement as overly broad and not narrowly tailored to the state's asserted interest); *McDaniel v. Paty*, 435 U.S. 618 (1978) (overturning Tennessee statute that prohibited ordained ministers from serving as delegates to the state constitutional convention); *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating filing fee for indigent candidates).

Footnote continued on following page.

the Ninth Circuit ignored the significant observation in *U.S. Term Limits* that those cases in which ballot restrictions have been *upheld* were all procedural in nature "and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position." *United States Term Limits, Inc. v. Thornton,* 514 U.S. at 835.

The Ninth Circuit's decision likewise fails to ask whether it is really necessary for the state to say that representatives like Tom Bates may never run for office again or whether it would have been enough to say that he must take off a period of time. Had the Ninth Circuit engaged in this inquiry, the record would have provided a clear and unequivocal answer: a lifetime ban is completely unnecessary.

The trial court took extensive evidence on and carefully considered the interests advanced by the state for imposition of the lifetime ban. The primary interest advanced at trial and in the text of the measure, was the interest in reducing the powers of incumbency. The district court found that some advantages of incumbency were "fair," such as the name recognition and support generated by doing a good job. The "unfair" advantages of incumbency – those targeted by the initiative – could

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In each of these cases, state law afforded at least some means of access, however difficult, to the ballot. Onerous signature requirements, early filing deadlines, and candidate filing fees can be overcome by candidates and supporters who work hard enough. Even the prohibition against ordained ministers is not immutable; if the candidate feels strongly enough, he or she can resign from the ministry.

be reduced or eliminated by means other than California's lifetime term limits. App. 189-91. Indeed, as the district court found,

> [T]he State's own expert testified that he prefers a limit on the number of consecutive terms that legislators may serve to lifetime term limits. He believes that lifetime term limits squander valuable legislative experience.
>
> App. 196-97.

In the face of this testimony it is hardly surprising that the district court found, as a matter of fact, that the burden imposed by California's term limits is not narrowly tailored to achieve its goals. A lifetime limit coupled with few terms is hardly necessary to reduce the powers of incumbency, if for no other reason than after an enforced term off, the termed-out legislator would be running not as the incumbent, but against an incumbent.

The state's reliance on increasing minority and female representation as a justification for term limits raises additional serious questions. *See Bates v. Jones*, 958 F. Supp. 1446, 1469-70 (N.D. Cal. 1997); App. 194. If, in order to level the playing field, the state may not reduce the political speech of incumbents and others who raise substantial campaign funds[9] or provide preferences to minorities in construction contracts,[10] how can it bar experienced legislators to achieve the same result?

Finally, as the dissent in the Ninth Circuit recognized, the severity of the burden imposed by California's

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[9] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

[10] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

term limits requires, at a minimum, that the voters know what they are doing. App. 54-61. But California's voters were simply not aware that they were imposing the critical *lifetime* ban on themselves and others. This is not just speculation on the part of the dissenters below, nor was it speculation on the part of the three-judge panel that found that the absence of notice deprived voters and candidates of due process of law. In this case the California Supreme Court had already found that the presence or absence of a lifetime ban in California's term limits initiative was "ambiguous." *Legislature v. Eu*, 54 Cal. 3d 492, 504, 816 P.2d 1309, 1315 (1991).

It was not hard to come to that conclusion, because California's Secretary of State, its chief elections officer, through her counsel, the California Attorney General, believed and argued to the California Supreme Court that the measure *did not* provide for a lifetime ban. *See id.* They lost that argument, but the very fact that the Secretary of State and the Attorney General thought that the measure did not provide for a lifetime ban is extraordinary evidence that a constitutional change of that magnitude was not clear to the voters. As the Attorney General conceded, the proponents were able to "benefit from the ambiguity." App. 58.[11]

In addition to severely undercutting the legitimacy of the claim that a *lifetime* ban was an essential feature of a new structure of state government, this failure of notice

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[11] The measure's opponents argued in ballot materials that the measure imposed a lifetime ban, but neither public officials, nor the proponents would confirm that such was the case. *See generally* App. 204-16.

about such a fundamental aspect of the measure denies due process of law[12] and warrants review by this Court.

CONCLUSION

No more than a few times a decade does a political issue of such public importance and emotion arise that it must be definitively resolved by this Court. Term limits for state legislative office is just such an issue and this is the case in which that issue should be resolved. The petition for a writ of certiorari should be granted.

Dated: January 12, 1998

Respectfully submitted,

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[12] *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 115-17 (1976); *United States v. Bass*, 404 U.S. 336, 349-50 (1971); *Greene v. McElroy*, 360 U.S. 474, 507 (1959).

BATES, et al. v. JONES, et al.

APPENDIX A OPINION BY EN BANC PANEL IN *BATES V. JONES*, FILED DECEMBER 19, 1997, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ...App. 1

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOM BATES; EDWARD H. LYMAN; RICHARD STERLING; ARDIS GRAHAM; RICHARD D. LEWIS; LAWRENCE J. BUCHALTER; JONATHAN BROWNING; RACHEL SHERMAN; MARTHA A. ESCUTIA; SYLVIA HERNANDEZ; ANA ROSA PENA; CLAUDIA NAVAR; BARBARA J. FRIEDMAN; SUSAN ZARAKOV; HARRIET SCULLEY,	) No. 97-15864)) D.C. No.) CV-95-02638-CW)) (Filed) Dec. 19, 1997)
Plaintiffs-Appellants,	)
v.	)
BILL JONES, Secretary of the State of California; BRADLEY J. CLARK; ALAMEDA COUNTY REGISTRAR OF VOTERS; CONNY McCORMACK, Los Angeles County Registrar of Voters,	)))))))
Defendants-Appellees,	)
and	)
PETER F. SCHABARUM; LEWIS K. UHLER; LEE A. PHELPS; NATIONAL TAX LIMITATION COMMITTEE; ALLIANCE OF CALIFORNIA TAXPAYERS & INVOLVED VOTERS,	))))))
Intervenors-Appellees.	)

BILL JONES, Secretary of the State of California, Defendant-Appellant, and PETER F. SCHABARUM; LEWIS K. UHLER, Intervenors-Appellants, v. TOM BATES; EDWARD H. LYMAN; RICHARD D. LEWIS; LAWRENCE J. BUCHALTER; JONATHAN BROWNING; RACHEL SHERMAN, Plaintiffs-Appellees, and NATIONAL TAX LIMITATION COMMIT EE; ALLIANCE OF CALIFORNIA TAXPAYERS & INVOLVED VOTERS, Intervenors, v. BILL JONES, Secretary of the State of California, Defendant-Appellant.	No. 97-15914 D.C. No. CV-95-02638-CW OPINION

Appeals from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued En Banc and Submitted November 21, 1997
San Francisco, California

Filed December 19, 1997

Before: HUG, Chief Judge, BROWNING, SCHROEDER, FLETCHER, PREGERSON, THOMPSON, O'SCANNLAIN, TROTT, RYMER, KLEINFELD and HAWKINS, Circuit Judges.

Opinion by Judge Thompson

THOMPSON, Circuit Judge:

OVERVIEW

A former state legislator and several of his constituents filed this action, contending the lifetime term limits in California's Proposition 140 violate their federal constitutional rights. After a trial, the district court agreed and enjoined the Proposition's enforcement. The district court stayed its injunction pending appeal.

A divided three-judge panel of this court affirmed the district court. A majority of the active judges of the full court then voted to rehear the case en banc and, to accommodate the parties' interests, we agreed to rehear the case on an expedited basis. We have done so and we now reverse the district court.

FACTS

The facts are set forth in detail in the panel's opinion, *see Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997). We summarize them briefly.

In 1990, California voters approved Proposition 140, an initiative which imposed specific lifetime term limits for state legislators and certain state officers. The Proposition limited state senators to two terms, state assembly members to three terms, and the state governor to two

terms. Cal. Const. art. IV, § 2(a); art. V, § 2. The Proposition also limited to two terms the Lieutenant Governor, Attorney General, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, and the members of the Board of Equalization. *Id.* at art. V, § 11; art. IX, § 2; art. XII, § 17. The Proposition declared that the lack of term limits created "unfair incumbent advantages" which "discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers." *Id.* at art. IV, § 1.5. The Proposition stated the term limits were necessary "[t]o restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office. . . . " *Id.*

In 1991, the state legislature and several individual legislators and constituents challenged before the California Supreme Court the constitutionality of Proposition 140's term limits. On a petition for a writ of mandate, the California Supreme Court concluded that Proposition 140's lifetime term limits did not violate the plaintiffs' federal constitutional rights. *See Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 503 U.S. 919 (1992).

Thereafter, in 1995, Tom Bates, a former member of the California Assembly, and a group of his constituents filed the present action, also alleging the lifetime term limits of Proposition 140 are unconstitutional. The district court agreed. *See Bates v. Jones*, 958 F. Supp. 1446 (N.D. Cal. 1997). The district court determined Proposition 140 imposed a severe burden on the plaintiffs' first and fourteenth amendment rights and was not narrowly tailored to advance a compelling state interest. The district court

enjoined the enforcement of Proposition 140 but stayed its injunction pending appeal.

A panel of this court, with Judge Sneed dissenting, affirmed the judgment of the district court on other grounds and did not reach the issue whether the term limits are constitutional. *Bates*, 127 F.3d at 844. This en banc review followed.

DISCUSSION

A. Res Judicata

The State presents a strong argument that *res judicata* bars the plaintiffs from bringing the present action because they are bound by the decision of the California Supreme Court in *Eu*. We conclude, however, that California would apply its public interest exception to the *res judicata* doctrine and, thus, would reexamine the merits of the constitutional issue.

California recognizes an exception to the doctrine of *res judicata* when "the public interest requires that relitigation not be foreclosed." *Kopp v. Fair Political Practices Comm'n*, 905 P.2d 1248, 1256 (Cal. 1995) (quotations and citations omitted). When the issue previously litigated involves an issue of public importance and there are unusual circumstances favoring reexamination of the issue, California does not apply preclusive effect to the prior determination. *See id.; City of Sacramento v. State*, 785 P.2d 522, 528-29 (Cal. 1990); *Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 825 P.2d 438, 440-42 (Cal. 1992).

The current case justifies application of the public interest exception. In *Eu*, the California Supreme Court

decided to exercise its original jurisdiction on a petition for a writ of mandate, because of the significance and importance of the legal issues raised by the challenge to Proposition 140. As a result, the usual avenues of appellate review were not utilized and the California Supreme Court did not have the benefit of a lower court record. Further, when deciding *Eu*, there was a paucity of case law addressing the validity of term limits. Since *Eu*, the United States Supreme Court has decided two significant cases, shedding light on that issue, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), and *Burdick v. Takushi*, 504 U.S. 428 (1992). We conclude that, in the unique circumstances of this case, the public interest exception applies. We therefore consider the merits of the case.

B. Notice

The three-judge panel did not resolve whether Proposition 140 violates the plaintiffs' first and fourteenth amendment rights. Instead, the panel determined Proposition 140 was invalid because the Proposition and the ballot materials did not provide California voters with sufficient notice that the Proposition imposed lifetime rather than consecutive term limits. *Bates*, 127 F.3d at 844. We disagree, and, consistent with the California Supreme Court, we hold that the relevant ballot materials and the surrounding context provided sufficient notice making it clear that Proposition 140 required lifetime bans.

The portion of the Proposition affecting legislators states: "No Senator may serve more than 2 terms" and "No member of the Assembly may serve more than 3 terms." Nowhere in the Proposition does it state that

these bans are less than absolute. As Judge Sneed pointed out in his dissent from the three-judge panel decision, the twenty-second amendment to the Constitution uses similar language: "[n]o person shall be elected to the office of the President more than twice. . . . " There certainly is no confusion that this language imposes a lifetime ban on the office of the President – even though the amendment does not specifically use the term "lifetime."

The surrounding circumstances also clearly indicate the voters had sufficient notice that Proposition 140 imposed lifetime bans. The opposition materials to the Proposition, which were circulated to California voters, clearly state that elected state legislators will be "banned for life" and use "lifetime ban" or similar terminology no less than eleven times. Moreover, when Proposition 140 was submitted to the voters in 1990, there were two competing initiatives on the ballot imposing term limits. In contrast to Proposition 140's lifetime ban, Proposition 131 proposed consecutive term limits. The two propositions received extensive media attention, which was heightened after the California Supreme Court issued a decision five days before the election addressing which of two propositions would govern in the event both were approved. *See Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm.*, 799 P.2d 1220 (Cal. 1990) (specifically addressing Propositions 68 and 73).

Assuming, without deciding, that a federal court may determine whether a state has given adequate notice to its voters in connection with a statewide initiative ballot measure dealing with term limits on state officeholders, we hold that California's notice with regard to Proposition 140 was sufficient.

C. Constitutionality of Proposition 140's Lifetime Term Limits

In *Burdick*, the Supreme Court set forth the analysis we must apply to determine the constitutionality of Proposition 140. We

> must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). If the measure in question severely burdens the plaintiffs' rights, we apply strict scrutiny review. *Burdick*, 504 U.S. at 434. If, however, the law "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

The rights which the plaintiffs seek to vindicate in this case are the right to vote for the candidate of one's choice and the asserted right of an incumbent to again run for his or her office. Proposition 140's impact on these rights is not severe. As argued by the State, term limits on state officeholders is a neutral candidacy qualification, such as age or residence, which the State certainly has the right to impose. *See Burdick*, 504 U.S. at 433. With regard to incumbents, they may enjoy the incumbency of a single

office for a number of years, and, as pointed out by the California Supreme Court, they are not precluded from running for some other state office.

Most important, the lifetime term limits do not constitute a discriminatory restriction. Proposition 140 makes no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender. Nor does the Proposition "limit[ ] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson*, 460 U.S. at 793.

Proposition 140's minimal impact on the plaintiffs' rights is justified by the State's legitimate interests. As the Proposition itself states, a lack of term limits may create "unfair incumbent advantages." Long-term entrenched legislators may obtain excessive power which, in turn, may discourage other qualified candidates from running for office or may provide the incumbent with an unfair advantage in winning reelection. As the Supreme Court stated in *Thornton*,[1]

> Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish. On the other

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[1] As pointed out by Judge Sneed in his dissent from the three-judge panel opinion, *Thornton* does not provide support for the argument that Proposition 140's term limits are unconstitutional. *Bates*, 127 F.3d at 868 (Sneed, J., dissenting). In *Thornton*, the Court addressed a state's attempt to impose term limits on members of Congress. *See Thornton*, 514 U.S. at 783. The case did not involve a state's amendment of its constitution to impose term limits on state officeholders.

> hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents.

Thornton, 514 U.S. at 837. California voters apparently perceived lifetime term limits for elected state officials as a means to promote democracy by opening up the political process and restoring competitive elections. This was their choice to make. *Cf. Clements v. Fashing*, 457 U.S. 957, 972 (1982).

We hold that Proposition 140's lifetime term limits do not violate the plaintiffs' first and fourteenth amendment rights. The judgment of the district court invalidating Proposition 140 is reversed and its injunction enjoining enforcement of the Proposition is vacated. The stay pending appeal is vacated as moot.

REVERSED.

O'SCANNLAIN, Circuit Judge, concurring in the result:

I concur in the result reached by Judge Thompson for the court and, except for a threshold concern, I would agree with his sound analysis of the merits. I also join in Judge Rymer's thoughtful discussion of the *Rooker-Feldman* doctrine and her analysis of *res judicata*. I write separately for two reasons: first, to suggest the utter absence of a federal question – irrespective of the *Rooker-Feldman* doctrine or *res judicata* – and hence an additional ground for our lack of jurisdiction to hear the case at all; and second, to respond to Judge Fletcher's dissent in which she urges that Proposition 140 is constitutionally infirm for lack of adequate "notice" to California voters.

I

I have grave doubt that our court has jurisdiction to review this case, irrespective of Judge Rymer's concurring opinion or Judge Schroeder's dissent. There is compelling authority that a state's adoption of term limits on its own government's elected officials fails to raise a substantial federal question.

In *Moore v. McCartney*, 425 U.S. 946 (1976), the Supreme Court last had the opportunity to rule on term limits for state officials and it summarily dismissed, for want of a federal question, an appeal from the West Virginia Supreme Court upholding term limits on state executive officials. *See State ex rel Maloney v. McCartney*, 159 W.Va. 513, 519-20 (1976).

The ruling in Moore has the same effect as a summary affirmance and is fully binding on all lower courts. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *Wright v. Lane County Dist. Ct.*, 647 F.2d 940, 941 (9th Cir. 1981). "Summary dismissals for want of a substantial federal question are decisions on the merits that bind the lower courts until subsequent decisions of the Supreme Court suggest otherwise." *Wright*, 647 F.2d at 941; *see also Mandel*, 432 U.S. at 176 (summary dismissals "prevent lower courts from coming to the opposite conclusions on the precise issues presented and necessarily decided by those actions.") The "precedential value of a dismissal for want of a substantial federal question extends beyond the facts of the particular case to all similar cases." *Wright*, 647 F.2d at 941.

Moore affirmed the *Maloney* decision which rejected an incumbent state officeholder's federal constitutional

claim that consecutive term limits violated the Fourteenth Amendment to the Constitution. In his dissent in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 799, 925 (1995), Justice Thomas (joined by Chief Justice Rehnquist and Justices O'Connor and Scalia) shed some light on the significance of *Moore*. *Thornton*, of course, concerned the issue of whether states could limit the terms of members of the Congress of the United States chosen by the electorate of such states. The Supreme Court held that the Qualifications Clause of the Constitution, Article I, Section 5, prohibited the establishment of term limits by a state for its representatives and senators serving in the Congress of the United States. *Id.* at 831. Justice Thomas disagreed with the majority that such laws should be reviewed under the Qualifications Clause, and instead noted that "laws that allegedly have the purpose and effect of handicapping a particular class of candidates traditionally are reviewed under the First and Fourteenth Amendments. . . . Term limit measures have tended to survive such review without difficulty." *Id.* at 925.

Justice Thomas was referring to laws imposed by a state on its federal representatives, as was at issue in *Thornton*, not by a state on its own officeholders. However, in support of the proposition that state-imposed term limits on federal representatives have tended to survive review without difficulty, Justice Thomas cited *Moore*, explaining that the Supreme Court dismissed the appeal from *Maloney*, "on the ground that limits on the terms of state officeholders *do not even raise a substantial federal question under the First and Fourteenth Amendments*." *Thornton*, 514 U.S. at 925 (emphasis added). The Supreme Court's disposition of *Maloney* on this ground is not

surprising in light of the Court's recognition of the fundamental interest of a state in determining the structure of its government. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). What is noteworthy about this reference, however, is that, as relevant as *Moore* may have been with regard to federal officials, it is compelling as applied to state term limits. Indeed, we are presented today with the same question the Supreme Court dismissed in *Moore* for want of a substantial federal question: the constitutionality of limits on the terms of state officeholders.

For us to ignore the precedential value of *Moore*, we must necessarily decide that there is a constitutionally significant difference between executive and legislative term limits or between permanent and consecutive term limits. It appears from *Thornton* that these differences were not particularly persuasive to Justice Thomas and those joining him as he drew no such distinction in his characterization of the disposition of *Moore*. Further, the fact that the myriad of courts which have considered the various types of term limits have all reached the same result – that term limits on state officeholders are constitutional[1] – also leads me to believe that, if there is any

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[1] *See e.g., League of Women Voters v. Diamond*, 923 F.Supp. 266, 272 (D.Me. 1996), *aff'd*, 82 F.3d 546 (1st Cir. 1996) (upholding consecutive legislative term limits); *Dutmer v. City of San Antonio*, 937 F.Supp. 587, 595 (W.D. Texas 1996) (upholding lifetime term limits for city officials); *Miyazawa v. City of Cincinnati*, 825 F.Supp. 816, 822 (S.D. Ohio 1993), *aff'd*, 45 F.3d 126 (6th Cir. 1995) (upholding consecutive legislative term limits); *Nevada Judge Assn. v. Lau*, 910 P.2d 898, 902-03 (Nev. 1996) (upholding lifetime judicial term limits); *U.S. Term Limits v. Hill*, 872 S.W.2d 349, 359-60 (Ark. 1994), *aff'd on other grounds*, 514 U.S. 779 (1995) (upholding lifetime legislative term limits);

difference, it is not of constitutional significance. Moreover, the California Supreme Court, when presented squarely with the argument that *Maloney* (and, by inference *Moore*) was of limited significance to Proposition 140's lifetime legislative term limits because it "involved a limitation on consecutive terms of a Governor," responded that "many, if not all of the considerations mentioned in *Maloney* (e.g., eliminating unfair incumbent advantages, dislodging entrenched political machines, restoring open access to the political process, and stimulating electorate participation) would apply with equal force to the legislative branch." *Legislature of the State of California v. Eu*, 54 Cal.3d 492, 523-24 (1991). Although I voice no opinion on the desirability of the policy considerations noted in *Eu*, I agree with the California Supreme Court that the considerations involved in executive term limits are equally applicable to legislative term limits, and the same holds for consecutive and lifetime term limits. I am not persuaded that there is a constitutionally significant distinction that would compel us to disregard *Moore*.

Judge Reinhardt, writing for the original panel in *Bates v. Jones*, 127 F.3d 839, 850 n.13 (9th Cir. 1997),

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Legislature v. Eu, 54 Cal.3d 492, 523-24 (1991) (upholding lifetime legislative term limits); *Maddox v. Fortson*, 172 S.E.2d 595, 596-97 (Ga. 1970) (upholding consecutive executive term limits); *Roth v. Cuevas*, 158 Misc.2d 238, 251-53, *aff'd*, 603 N.Y.S.2d 736, *aff'd*, 82 N.Y.2d 791 (1993) (upholding consecutive term limits for city officials); *Cawdrey v. Redondo Beach*, 15 Cal.App.4th 1212, 1231 (1993) (upholding lifetime legislative term limits); *see also Gregory*, 501 U.S. at 473 (upholding lifetime ban on judges after age seventy).

responded to the State's assertion that the constitutionality of Proposition 140 was controlled by *Moore* by noting that extensive intervening doctrinal developments counseled against continued reliance on that case, citing *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), *overruled by Mandel*, 432 U.S. 173, for the proposition that "reliance on the fact that the Supreme Court has branded a particular question unsubstantial ceases to be appropriate 'when doctrinal developments indicate otherwise.' " In support of the contention that doctrinal developments indicate otherwise, Judge Reinhardt cited the Supreme Court's decisions in *Burdick v. Takushi*, 504 U.S. 428 (1992), *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Thornton*, 514 U.S. 779. Upon review of these cases, however, along with the other relevant cases decided by the Supreme Court in the years between *Moore* and *Bates*, I am not persuaded that doctrinal developments have significantly changed Moore's fundamental premise. *See Hicks*, 422 U.S. at 344.

As an initial matter, *Thornton* does not speak at all to the question of whether limits on the terms of state officeholders raises a substantial federal question. *Thornton* is concerned exclusively with the constitutionality of state-imposed term limits on *federal* officeholders. The Supreme Court's decision was bottomed on the Qualifications Clause and the notion of a "national citizenship," neither of which, of course, has any relevance to this case. *See Thornton*, 514 U.S. at 806 ("[T]he Qualifications Clauses were intended to preclude the States from exercising any [control over congressional qualifications] and to fix as exclusive the qualifications in the Constitution."); *see also Thornton*, 514 U.S. at 841-844 (Kennedy, J., concurring) (discussing notion of a "national citizenship"

and noting that "the National Government is and must be controlled by the people without collateral interference by the States.") Therefore, while *Thornton* would appear to the undiscerning eye to offer guidance on the issue we face today, upon closer examination, it is clear that it is considerably more limited in scope if not entirely inapposite.

As to other intervening doctrinal developments, although it is true that the Supreme Court has decided noteworthy ballot access cases in the period between *Moore* and *Bates*, it is doubtful that these cases detract from *Moore*'s precedential value. Significantly, in no case since *Moore* has the Supreme Court responded so directly to the issue before us today. While subsequent cases have presented numerous peripheral ballot access issues to the Court, none has presented the question of the constitutionality of state-imposed term limits on state officeholders as squarely as *Moore*. For this reason alone, I remain skeptical of the failure of our court to take this case into consideration in disposing of the matter before us.

Moreover, *Moore* is not inconsistent with any of the significant ballot access cases. As noted in *Clements v. Fashing*, 457 U.S. 957, 964 (1982), the Supreme Court has departed from "traditional equal protection analysis . . . in two essentially separate, although similar, lines of ballot access cases," those which concern restrictions which are based on wealth, *see Clements*, 457 U.S. at 964 (citing *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Lubin v. Panish*, 415 U.S. 709, 717-18 (1974)), and those which impose burdens on new or small political parties or independent candidates. *Id.* (citing, inter alia, *Illinois State Bd.*

of Elections Bd. v. Socialist Workers Party, 440 U.S. 173 (1979); *Storer v. Brown*, 415 U.S. 724 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974)). *Burdick*, 504 U.S. at 441-42 (approving Hawaii's ban against write-in candidates), *Anderson*, 460 U.S. at 806 (striking down state-imposed filing requirements on presidential candidates), and *Timmons v. Twin Cities*, 117 S. Ct. 1364, 1375 (1997) (upholding state antifusion law prohibiting candidates from appearing on ballot as candidate of more than one political party), all clearly fit into the latter category. *See Clements*, 457 U.S. at 64. Term limits on state officials, however, do not fit into either category, and, more importantly for purposes of the Supreme Court's analysis, do not unfairly or unnecessarily burden "the availability of political opportunity." *Id.* (quoting *Lubin*, 415 U.S. at 716). While a failure to provide access to the ballot for new or small political parties or independent candidates or on the basis of wealth may effectively result in the exclusion of unique ideas and viewpoints from the political marketplace, the imposition of term limits raises no similar concerns. Term limits apply to politicians of every stripe regardless of party affiliation. It is understandable that the Supreme Court would consider the two lines of cases noted in *Clements* to raise a substantial federal question as they have a significant potential clearly to infringe upon First and Fourteenth Amendments rights. *See e.g., Clements*, 457 U.S. at 965 (burdensome requirements on small and independent parties "may burden First Amendment interests in ensuring freedom of association"). Terms limits, which have no disparate impact on any cognizable group, have less of a potential so to offend.

Consequently, I submit that intervening doctrinal developments in the ballot access cases have not weakened *Moore*'s message that term limits on state officeholders do not present a federal question. As *Moore* is the last word from the Supreme Court on the issue of term limits on state officeholders, we are compelled to give it appropriate weight in disposing of this case.

II

Judge Fletcher argues in her dissent that Proposition 140 is defective because the voters were not provided with "notice that they were voting on a severe limitation to their fundamental right to vote for candidates of their choice." *See infra*, Judge Fletcher dissenting opinion at 18; *see also infra*, Judge Fletcher dissenting opinion at 14 (incorporating *Bates*, 127 F.3d at 856-63). Although the court's opinion avoids this issue by assuming, without deciding, that a federal court may determine whether a state has given adequate "notice" to its voters in connection with a statewide initiative ballot measure, I feel that Judge Fletcher's analysis should not go unchallenged. First, I will examine whether the people have a "fundamental right to vote for candidates of their choice," and then I will consider whether some special "notice" is necessary when the voters of a state enact legislation via the initiative process.

A

The assertion that the people have a "fundamental right to vote for candidates of their choice" implicates at least two distinct, though closely-related, rights: the right

to vote and the right to run for elective office. *See Lubin*, 415 U.S. at 716 ("[V]oters can assert their preferences only through candidates or political parties. . . . The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters.") Consequently, in determining whether people have a fundamental right to vote for candidates of their choice, it is necessary to examine both the established right to vote and the asserted right to be a candidate and how the two interact.

Voting has long been recognized by the Supreme Court as a "fundamental right." *See Harper v. Virginia Board of Elections*, 383 U.S. 663, 667 (1965); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). It is axiomatic to say that the right to vote lies at the very core of our system of representative democracy. The right to vote in federal elections is conferred explicitly in Article I, Section 2 of the Constitution. *See* U.S.CONST. art. I, § 2. The Constitution is silent, however, on the right to vote in state elections; not surprisingly, it does not grant such a right, nor does it bestow upon Congress the power to determine the qualifications of state voters. *See Harper*, 383 U.S. at 667; *see also Oregon v. Mitchell*, 400 U.S. 112, 130 (1970). It is within the power of the several states to determine voter qualifications for state elections, so long as said qualifications do not violate any constitutional provision or "any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Harper*, 383 U.S. at 667 (quoting *Lassiter v. Northampton Election Board*, 360 U.S. 45, 51 (1959)). As noted by Professor Tribe, every state imposes some restrictions on the franchise. *See* Laurence H. Tribe, *American Constitutional Law* § 13-10, at

1084 (2d ed. 1988) (hereinafter, "Tribe"). States have imposed restrictions requiring that voters be of a certain reasonable age, that felons be denied the right to vote, *see Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), and that voters be state citizens and residents. *See, e.g., Marston v. Lewis*, 410 U.S. 679, 679-80 (1973) (upholding 50-day voter residency requirement). These restrictions plainly infringe upon the right to vote – in some instances, completely prohibiting access to the franchise for millions[2] of people – yet all have survived judicial scrutiny at the highest level. Consequently, although the right to vote is considered fundamental, fundamental is not commensurate with absolute.

The necessary corollary to the notion that the people have a fundamental right to vote for candidates of their choice is that there exists a constitutional right to vote for a particular candidate. It seems beyond cavil that the former cannot survive without the latter. The right. to vote for a particular candidate, in turn, perforce implicates the right to stand for elective office. The district court in *Bates v. Jones*, 958 F.Supp. 1446, 1460 (N.D.C.A. 1997), in identifying the constitutional rights implicated by Proposition 140's lifetime legislative term limits, gleaned from the Supreme Court's decision in *Burdick*, 504 U.S. at 441, a "right to vote for [a] particular candidate." The district court proclaimed that voters can be

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[2] There were approximately 8,867,000 Californians under the age of eighteen in 1996, the age at which the right to vote cannot be denied or abridged under the twenty-sixth amendment to the U.S. Constitution. *See* U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 33 (1997); U.S. CONST. amend. XXVI.

denied the opportunity to vote for a particular candidate only if "constitutionally adequate" means existed for that candidate to appear on the ballot. *See Bates*, 958 F.Supp. at 1460. I must respectfully disagree. The district court reads far too much into *Burdick's* discussion of the means of gaining access to the Hawaii ballot. Indeed, it is well-established that "[a]lthough [a voter] is guaranteed an equal voice in the election of those who govern, [he or she] does not have an unlimited right to vote for any particular candidate." *Burdick v. Takushi*, 937 F.2d 415, 418 (9th Cir. 1991), *aff'd*, 504 U.S. 428 (1992). As we noted in *Burdick*, the Supreme Court has upheld numerous restrictions imposed by the states on who may run for certain state offices. *Id.*; *see e.g.*, *Munro v. Socialist Workers Party*, 479 U.S. 189, 196-97 (1986) (upholding state requirement that minor-party candidates receive at least 1% of votes in state's multi-party primary election for candidate to appear on ballot); *Clements*, 457 U.S. at 972 (upholding provisions of state constitution which provided for automatic resignation of certain state and local officeholders who became candidates for any other state office and which prevented most government officials from becoming eligible to serve in state legislature before completing current term of office); *Storer*, 415 U.S. at 728-29 (upholding state disaffiliation provision which prevented person from running as independent candidate if he registered with political party during year prior to immediately preceding primary); *American Party of Texas*, 415 U.S. at 782 (state can deny place on ballot to frivolous candidate by requiring all candidates to "demonstrate a significant, measurable quantum of community support.") Consequently, while there is a right to equal participation in

voting, a constitutional right to vote for a particular candidate simply does not exist.[3]

Further, if there is a right to vote for a particular candidate, such right necessarily implicates a corresponding constitutional right to be a candidate. Judge Fletcher suggests in her dissent that "every attempt by a state to set restrictive qualifications concerning who can and who cannot serve as a candidate for elective office implicates rights that are 'fundamental' and requires careful scrutiny." *See infra,* Judge Fletcher dissenting opinion at 21. The district court also suggested that there is a "right to run for a particular office" that requires protection akin to that afforded the right to vote. *See Bates,* 958 F.Supp. at 1461 (citing *Lubin,* 425 U.S. at 716). Once again, I respectfully disagree both with Judge Fletcher and the district court. The interest of an individual in being a candidate is of no exceptional constitutional significance; it does not merit a departure from traditional equal protection principles. "Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access 'does not of itself compel close scrutiny.' " *Clements,* 457 U.S. at 962 (quoting *Bullock,* 405 U.S. at 143).

For the foregoing reasons, the asserted constitutional right of the people "to vote for the candidates of their choice" simply does not exist. Consequently, it is evident that no "fundamental right" was "severely limited" by

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[3] *See* Tribe at 1062 ("Election-related rights display the special feature that the equality with which they are available, rather than the fact of their availability or absence, ordinarily proves decisive.")

Proposition 140 and thus, the dissent's analysis is fatally flawed.

B

As to the contention that Proposition 140's lifetime legislative term limits must fail because the voters of California were not provided with adequate "notice" of the "severe limitation" the provision would impose on their fundamental rights, there is even less foundation in law or tradition. While I agree with the court's opinion that sufficient "notice" of the extent of the term limits provision was provided to the voters of the State of California, I hesitate to assume for even a moment that such "notice" was required or even within the province of a federal court to determine.[4] *See, supra* majority opinion at 5-6.

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[4] Along these lines, I find no comfort in the two purported "limitations" on the so-called "notice" doctrine: that it will be applied only in cases where an initiative affects a "fundamental right" and only when said initiative imposes a "severe" limitation on that right. *See infra,* Judge Fletcher dissenting opinion at 18. First, as evidenced by the assertion of a fundamental right of the people to vote for the candidates of their choice, limiting the "notice" doctrine merely to fundamental rights will in actuality be no limitation at all. Indeed, given that the case law is replete with references to rights which are considered "fundamental," *see e.g., California Dept. of Corrections v. Morales,* 514 U.S. 499, 515 (1995) (ex post facto clause) (Stevens, J., dissenting); *Benton v. Maryland,* 395 U.S. 784, 794 (1969) (double jeopardy); *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968) (jury trial), it seems apparent that "notice" would be required in any initiative that tangentially touches upon some cognizable constitutional right. Second, whether a burden is "severe" inevitably becomes a matter of perspective. The original panel determined, in part, that the burden imposed

Judge Reinhardt, writing for the original panel, held that, although the proper interpretation of Proposition 140 is purely a matter of state law, "the issue whether the people's fundamental political rights may be severely burdened by means of an 'ambiguous' initiative that 'the average voter' would only 'likely' understand is . . . a question of federal law." *Bates*, 127 F.3d at 857. Judge Fletcher argues in her dissent that, while the California Supreme Court in *Eu* was only concerned with what the "average" voter "likely" believed about Proposition 140, "surely the adequacy of notice cannot turn on what a person of average intelligence 'likely' understood." *See infra*, Judge Fletcher dissenting opinion at 15. According to Judge Fletcher, evidently, the federal standard for adequate "notice" when fundamental rights are at stake requires a different and more stringent inquiry than the state standard. Searching the Constitution, however, I am unable to locate an "ignorant voter clause" that vests federal courts with the power to review voter-enacted legislation to ensure that enough people were capable of understanding what they voted for at the ballot. In all fairness, Judge Fletcher does not attempt to ground this newly-discovered right in the Constitution. Instead, it

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by Proposition 140 was severe by analogizing it to a death penalty case. *See Bates*, 127 F.3d at 859 (citing *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2711 (1988), and noting that, while Justice O'Connor stressed that *Thompson* was an "unusual" and "unique" case, *Bates* was equally "unusual" and "in many ways, as compelling.") To call the limitation imposed by Proposition 140's term limits "severe" by analogizing it in some respects to a death penalty case is misguided, to say the least, and demonstrates how devoid of content the terms "fundamental" and "severe" really are.

appears to be simply yet another novel right that "implicates due process concerns," *see Bates*, 127 F.3d at 857, created by weaving together snippets from various cases,[5] none of which would seem to betray that it would one day have the dubious distinction of being called upon for this purpose.

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[5] As the original panel claimed that "[p]erhaps the case that is most comparable to the one before us is *Thompson v. Oklahoma*, 487 U.S. 815, 857 (1988)," *Bates*, 127 F.3d at 858, I will limit my discussion on this point to that case. *Thompson* involved the interaction of two Oklahoma statutes, one allowing 15-year olds to be treated as adults in the criminal justice system for some purposes and another which authorized capital punishment for murder. Due to the interaction of these two statutes, Thompson, a 15-year-old minor, was convicted of first degree murder and sentenced to death. Justice O'Connor, concurring in the judgement, voted to vacate the death sentence on the ground that "there [was] a considerable risk that the Oklahoma Legislature either did not realize that its action would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility." *Id.* at 857 (O'Connor, J., concurring). Citing Justice O'Conner's concurrence in support of a general "notice" requirement is somewhat disingenuous, however, because it ignores Justice O'Connor's limitation of her concurrence to death penalty cases and, specifically, "the peculiar circumstances" presented before the Supreme Court in *Thompson*. *Id.* The panel's attempt to diminish this distinction by claiming that the rights involved in Bates' action were "equally unusual and, in many ways, as compelling," *Bates*, 127 F.3d at 859, is unavailing. As Judge Fletcher herself has recently noted, death is "unique." *See Thompson v. Calderon*, 120 F.3d 1045, 1049 (9th Cir. 1997) (quoting Justice O'Connor's concurrence in *Thompson v. Oklahoma*, 487 U.S. at 856). With all due respect to the *Bates* plaintiffs, there is life after the California Assembly.

Such "notice" requirement is most likely grounded in an antipathy for and distrust of the initiative process which finds support in neither the Constitution nor Supreme Court precedent. Although it has been argued that the Supreme Court reviews popular legislation more closely than legislation enacted by representatives, *see* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1562-65 (1990); Mark Slonim & James H. Lowe, Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 Wash. L. Rev. 175, 194-96 (1979), an examination of the case law does not bear out such assertion. As noted in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672-73 (1976), "[i]n establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." The Supreme Court applies the very same standard of review both to popular and to representative legislation and has held that the fact that legislation was enacted by initiative "is without constitutional significance."[6] *Lucas v. Forty-Fourth General Assembly*, 377 U.S.

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[6] Skeptics, of course, will point to the decisions in *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996), *Washington v. Seattle School District No. 1*, 548 U.S. 457, 471 (1982), and *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967), in which the Supreme Court invalidated voter initiatives, in support of the notion that popular legislation is subject to a higher standard of review than traditional legislation. One should not conclude from these cases, however, that the Supreme Court will scrutinize initiatives more closely than representative legislation, only that the Supreme Court will carefully review any legislation – however enacted – that impacts important constitutional rights. The laws at issue in *Romer*, *Seattle School District*, and *Reitman* were struck down on the ground that, while facially neutral, they were enacted for discriminatory purposes. *See Romer*, 116

713, 737 (1964) (striking down, on equal protection grounds, apportionment scheme that violated "one person-one vote" principle notwithstanding approval by voters of state).

To engraft a due process "notice" requirement on popular legislation is to invite the federal courts to look behind initiatives to ensure that voters were capable of understanding the potential consequences of their actions and acted accordingly. This is simply beyond our province. The Supreme Court has historically presumed that legislators are aware of the consequences of the laws which they enact and has declined to invalidate legislation on the ground that "Congress was unaware of what it accomplished or . . . was misled by the groups that appeared before it." *See United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("The language of the statute was clear and we have historically assumed that Congress intended what it enacted."); *see also Taxpayers to*

S. Ct. at 1627 (striking down amendment to state constitution which prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination, noting that "amendment seems inexplicable by anything but animus toward the class that it affects"); *Seattle School District*, 458 U.S. at 471 ("despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes"); *Reitman*, 387 U.S. at 381 (invalidating provision of state constitution that "was intended to authorize, and does authorize, racial discrimination in the housing market"). Such scrutiny is obviously not unique to popular legislation, but extends equally to all forms of legislation. *See United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973) (striking down on rational basis review Congressional legislation neutral on its face that had purpose of discriminating against "hippies").

Limit Campaign Spending v. Fair Political Practices Comm'n, 799 P.2d 1220, 1235 (Cal. 1990) ("In order to further the fundamental right of the electorate to enact legislation through the initiative process, this court must on occasion indulge in a presumption that the voters thoroughly study and understand the content of complex initiative measures.") Further, it has long been established that there is no due process right to "notice" in the enactment of legislation. *See Bi-Metallic Investment Co. v. State Board of Education*, 239 U.S. 441, 445 (1915) (no due process right to notice before government acts in legislative capacity). In light of the fact that there is no constitutionally significant difference between popular legislation and representative legislation, *see Lucas*, 377 U.S. at 737, we must reject the temptation to create a due process right to "notice" in the initiative process. We simply have no franchise to presume that the citizens of California could not understand what they were doing at the ballot box on November 6, 1990.

III

Like Judge Thompson, I would not interfere with the will of the people of California in adopting Proposition 140; I would reach such result, however, by the route charted by Judge Rymer or Part I of the foregoing analysis. With respect, for the reasons expressed in Part II, I must fundamentally reject the view expressed by Judge Fletcher that federal courts have a writ to impose a newly-minted "notice" requirement on the voters of California.

RYMER, Circuit Judge, with whom O'SCANNLAIN, Circuit Judge, joins, concurring in the result:

I agree with Judge Thompson's disposition of Bates's appeal, assuming the merits are reached and that an *Anderson/Burdick* balancing test is required. However, I write separately for two reasons: First, to explain why I believe that the district court should not have entertained this action because it involves the same claim by related parties already considered and decided by the California Supreme Court. In effect, we are asked to review the state supreme court's opinion that Proposition 140 is constitutional – but that's not our right to do. Only the United States Supreme Court can overturn a decision by the highest court of a state. For a federal district court to make an independent determination of constitutionality in the face of a final state court adjudication on the same point implicates well-settled doctrines of finality, federalism, and the limits of appellate jurisdiction. Therefore, in my view, the district court lacked the authority to proceed; and in any event, should have declined to do so on grounds of res judicata.

Second, assuming that we have jurisdiction, I write separately to suggest that the state's interest in Proposition 140 is somewhat different, and even stronger than Judge Thompson acknowledges, because the people of the State of California exercised their own constitutional right to choose the form of their representation in the legislative branch of state government. In this they acted in accordance with the Constitution's guarantee that citizens of each state shall have the right to determine the structure of their own government so long as it is republican in form. Since the state's interest in structuring the

state legislature is firmly rooted in the Constitution, a decision to adopt term limits for state officers is presumptively constitutional. In that Proposition 140 is content neutral and no one suggests it discriminates on any basis plainly precluded by other provisions of the Constitution, the presumption is not overcome. For the same reasons, the state's interest in prescribing the qualifications of state officeholders is so powerful, given its constitutional dimension, that the decision to set the number of terms in office as a qualification easily survives whatever scrutiny is required.

I

In *Legislature v. Eu*, 54 Cal.3d 492 (1991), the Legislature, several individual legislators, and various citizens, voters and taxpayers brought the same constitutional challenges to Proposition 140 that Bates (then, as now, a member of the Legislature), other legislators, and other voters bring in this action. The *Bates* plaintiffs are represented by the same law firm that represented the plaintiffs in *Eu*. Apart from budgetary limitations in Proposition 140 that were at issue there but not here, the exact challenges to the constitutional validity of Proposition 140 were raised, considered, and decided by the California Supreme Court in *Eu*. The plaintiffs in both cases claim that the lifetime ban substantially burdens their fundamental First and Fourteenth Amendment rights. The court considered and balanced, under *Anderson*, the character and extent of injury to the incumbent's right to run for public office and the voters' right to reelect the incumbent; the legitimacy of the state's asserted interests (restoring competitive elections,

encouraging qualified candidates to seek public office, and eliminating unfair incumbent advantages); and the necessity of imposing the lifetime restriction. Having done so, the California Supreme Court concluded that the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those who would vote for them, and therefore held that Proposition 140 passes constitutional muster.

How can this ruling possibly be revisited?

A

No federal court except for the United States Supreme Court has appellate jurisdiction over final decisions of the California Supreme Court. As the United States Supreme Court made clear in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), when a state court decides a federal constitutional question that actually arose in the cause before it, its decision is open to reversal or modification by the United States Supreme Court. Unless and until that happens, however, it is an effective and conclusive adjudication. *See also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Eu*, the California Supreme Court had to decide whether term limits imposed by Proposition 140 violated the United States Constitution, and its decision, whether right or wrong, was a proper exercise of that court's jurisdiction. Accordingly, no court of the United States other than the Supreme Court can entertain a proceeding to reverse or modify it because to do so would be to exercise appellate jurisdiction which federal district courts (and we) do not have over state court judgments.

As we explained in *Dubinka v. Judges of the Superior Court*, 23 F.3d 218 (9th Cir. 1994):

> Federal district courts may exercise only original jurisdiction; they may not exercise appellate jurisdiction over state court decisions. This rule arises from the interplay of two jurisdictional statutes: 28 U.S.C. § 1331, which grants district courts original jurisdiction over "civil actions arising under" federal law, and 28 U.S.C. § 1257, which grants the Supreme Court the right to review "final judgments . . . rendered by the highest court of a State."

Id. at 221 (citations omitted); *see also Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970).

The *"Rooker-Feldman"* doctrine applies even when the challenge to a state court decision involves federal constitutional issues, because state courts are as competent as federal courts to decide federal constitutional issues. *Dubinka*, 23 F.3d at 221; *Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th Cir. 1986). Any other rule would result in a waste of judicial resources, and cause needless friction between state and federal courts – as this case amply illustrates. *See McNair*, 805 F.2d at 891. Indeed, to re-review the constitutionality of Proposition 140 put the district court on a collision course with the California Supreme Court. At the very least this is unseemly, because the California Supreme Court had the right to decide Proposition 140's constitutionality. The United States Supreme Court saw fit to let that court's ruling stand. Appellate authority would be turned upside down if the federal district court were able effectively to

"overrule" the California Supreme Court. Moreover, as a practical matter, disagreement between a federal district court (or this court) and the California Supreme Court would make a mess of California elections. This is why *Rooker-Feldman* instructs that a federal district court lacks jurisdiction to start down this path.

Of course, federal district courts do have jurisdiction over a general constitutional challenge to a state enactment that does not require review of a final state court decision in a particular case.[1] *See. e.g., Feldman,* 460 U.S. at 482-86 (challenge to application of bar admission rule differed from challenge to its constitutionality). In a close case, we decide whether a case falls on the side of permissible general challenge, or the side of an impermissible appeal, by asking whether the constitutional challenge raised in the federal court was "inextricably intertwined" with the state court's decision. *See, e.g., McNair,* 805 F.2d at 890-93 (holding that we lacked jurisdiction); *Dubinka,* 23 F.3d at 221-22 (applying test but holding that we had jurisdiction). However, here, there can be no serious question that the constitutional challenge was "inextricably intertwined"; it is, in fact, the only thing decided by the California Supreme Court in *Eu* and it is the only thing the federal district court was asked to decide in *Bates.*

It seems clear to me, therefore, that the district court lacked jurisdiction and (apart from saying that), so do we.

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[1] Even so, federal courts often abstain to allow the state courts to interpret state statutes first. *See Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496 (1941).

B

But even if we have jurisdiction, related principles of finality embedded in res judicata also counsel against our revisiting what the California Supreme Court decided. Unsurprisingly, under California law, which we apply to this question,[2] the doctrine of res judicata precludes parties or their privies from relitigating a cause of action or issue that has been finally determined by a court of competent jurisdiction. *Bernhard v. Bank of America*, 19 Cal. 2d 807, 810 (1942); *Lucido v. Superior Ct.*, 51 Cal. 3d 335, 341 (1990) (party asserting bar must show the factual or legal issues are identical; the issue was actually litigated and there was a final judgment on the merits; and the party to be estopped was in privity). California recognizes, as we do, that claim and issue preclusion curtail vexatious litigation, promote judicial economy, and avoid the issuance of inconsistent judgments that undermine the integrity of the judicial system. *See Lynch v. Glass*, 44 Cal. App. 3d 943, 948 (1975). Each supports the state's position in this case.

The legal issue in *Eu* and *Bates* is identical. The issue was actually, and actively, litigated in the California Supreme Court, which rendered a final judgment on the merits. And legislators as well as voters were parties to *Eu*, as they are in *Bates*. To be sure, they are different legislators, and different constituents, but I fail to see what difference that makes because their respective interests (in succeeding themselves or voting for incumbents)

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[2] *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379-82 (1985); *In re Russell*, 76 F.3d 242, 244 (9th Cir. 1996).

are precisely the same. So is their lawyer. Thus, the *Bates* plaintiffs share an identity of interest with, and adequate representation by, the losing parties in *Eu*. Under these circumstances, I cannot believe that any court in California would not feel itself, and a new set of voters or legislators, bound by the California Supreme Court's decision in *Eu*. *See Dyson v. California State Personnel Bd.*, 213 Cal. App. 3d 711, 723-24 (1989) (recognizing that the question is essentially one of policy, focusing on whether the relationship between the party bringing the earlier suit and the nonparty bringing the current suit is "sufficiently close" to warrant preclusion).[3]

While courts in California may decline to apply the doctrine of collateral estoppel when preclusion would not serve the public interest and might work an injustice, *see e.g., Kopp v. Fair Political Practices Comm'n*, 11 Cal. 4th 607 (1995), *City of Sacramento v. State*, 50 Cal.3d 51 (1990); *Louis Stores, Inc. v. Dep't of Alcoholic Beverage Control*, 57 Cal. 2d 749 (1962), neither reason would require a California court (or us) to revisit the constitutionality of Proposition 140. Nothing substantive changed about the application of Proposition 140 from October 10, 1991 (when *Eu* was decided), or from March 9, 1992 (when certiorari was denied), until 1995, when Bates filed this action – except that Bates himself came up against the

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[3] *See also Ferris v. Cuevas*, 118 F.3d 122 (2nd Cir. 1997) (recognizing the significance of representation by same attorney to application of res judicata principles in cases arising out of the City's refusal to certify initiative petitions where parties were similar but not identical and constitutional issues that could have been raised, but weren't, in state court were asserted in federal court action).

term limits ban.[4] That, however, cannot suffice, for the issue of constitutionality which Bates now raises was raised by his colleagues, and was fully litigated, in *Eu* by the state's highest tribunal. Likewise, the same constitutional issues that Bates's constituents raise were raised by his colleagues' constituents in *Eu*. Therefore, no injustice inheres for new or different voters, or for new or different legislators; they are equally stuck with the ban on term limits. Nor do the intervening decisions in *Burdick* and *Thornton* suggest otherwise: assuming the *Anderson* test applies, *Burdick* supports the decision reached by the California Supreme Court (which applied the *Anderson* standard) because *Burdick* simply affirmed that the *Anderson* analysis also governs inquiries into the propriety of state election laws; and *Thornton* involved the attempt by a state to impose term limits on a federal office, which raises different constitutional questions from the state's adopting term limits on state offices.

Indeed, to revisit the constitutionality of Proposition 140 subverts, rather than serves, the public interest. The California Supreme Court (the final arbiter of state law, and a court quite competent to decide federal constitutional law), made its decision and that decision was left in place when the United States Supreme Court refused to grant a writ of certiorari. It is obviously important for California elections to be held without continual confusion over the governing law. That is a powerful reason the validity of Proposition 140 should be settled by *Eu*.

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[4] Other legislators who are parties to this action became so at the invitation of the panel.

I realize that, at the end of the day, whether preclusion principles apply is a matter of policy. But I believe that California courts would conclude that there are no "exceptional circumstances" which justify applying the "extremely narrow" public interest exception in this case. *Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 2 Cal. 4th 251, 259 (1992).

II

As Professor Tribe has pointed out, decisions about how people are to participate in their own representative government and how they choose to represent themselves is "the very essence of *all* self-government." Laurence H. Tribe, *American Constitutional Law* 398 (2d ed. 1988). So, even assuming that the district court had jurisdiction and properly refused to preclude repetitive litigation on the constitutionality of Proposition 140, I start (and mostly stop) with the constitutional right exercised by the people of the State of California to have themselves represented in the legislative branch of their state government by citizen-legislators. That right resides in Article IV, § 4 of the United States Constitution, which declares that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."

As Professor Merritt has explained, the Guarantee Clause

> restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents. . . . In order to ensure that state and local government remain responsive to their constituents, . . . citizens must have the power to choose

> the governmental forms that work best for them. The guarantee clause, therefore, grants states control over their internal governmental machinery.

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 41 (1988). Although there is much debate about the full meaning of Article IV, § 4,[5] at a minimum it promises the states authority to set qualifications for state and local offices (so long, at least, as they do not otherwise discriminate on an invidious basis plainly prohibited by the Constitution). *See* Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. Colo. L. Rev. 815, 828-829 (1994).

This principle has long been recognized by the Supreme Court. As the Court wrote in *In re Duncan*, 139 U.S. 449, 461 (1891), "the distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws." Most recently, Justice O'Connor reiterated the point writing for the plurality in *Gregory v. Ashcroft*, 501 U.S. 452 (1991):

> The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a

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[5] *See, e.g.*, Symposium, *Ira C. Rothgerber, Jr. Conference on Constitutional Law: Guaranteeing a Republican Form of Government*, 65 U. Colo. L. Rev. 709 (1994).

> sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor v. Beckham*, 178 U.S. 548, 570-571, 44 L.Ed. 1187, 20 S.Ct. 890 (1900). *See also Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161, 36 L.Ed. 103, 12 S.Ct. 375 (1892) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.").

Gregory, 501 U.S. at 460. The authority of the people of the states to determine the qualifications of their officials

> is an authority that lies at " 'the heart of representative government.' " It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government."

Id. at 463 (citations omitted).

Accordingly, when the people of California enacted Proposition 140 to set the number of terms in office as a qualification for members of their legislature, they were exercising an authority "that lies at the heart of representative government." As the authority to determine the terms upon which state offices shall be held is grounded in Article IV, § 4, and to define how they want to be

represented is a right secured to the citizens of each state, a term limits qualification must be presumptively constitutional. Therefore, unless the qualification is plainly prohibited by some other provision in the Constitution, it is constitutional.

Proposition 140 discriminates against no one, applies equally to all citizens, and does nothing to restrict the franchise or freedom of association among like-minded voters and public officeholders (past, present or future). Thus, it is constitutional, for it is well within the range of decisions guaranteed to the citizens of California without federal interference.

For these reasons I would not start by analyzing Proposition 140 under the *Anderson/Burdick* test, because terms limits are a qualification for office – not for access to the ballot. Yet I agree that if that test applies, California's lifetime term limits pass muster for the reasons explained by Judge Thompson and one more: the state's interest in the structure of its legislature is among the strongest possible interests that the citizens of California could have, because it lies at the core of the state's constitutional authority.

HAWKINS, Circuit Judge, concurring:

I join the majority opinion because, although I believe there are responsible arguments to be made on both sides, I do not believe the Constitution of the United States restrains citizens of a state from imposing term limits, even a lifetime ban on future service, on their elected state representatives. Our role here, of course, is

to judge not the wisdom of such a measure, but its constitutionality.

I also write separately to express briefly two other points that deserve mention.

First, while I agree with the majority in its res judicata analysis, I would go further than the majority. Not only does the public interest exception enable us to review this matter, but even if the exception did not apply, this case would not be barred by res judicata because the parties in this case are not in complete privity with those in *Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 503 U.S. 919 (1992).

The interests of Bates (and the other named plaintiffs) could not have been adequately represented by the Legislature or the particular legislators in *Eu*. Bates et al. assert their own individual right to run for an additional term or, in the case of their supporters, to vote for the particular candidate of their choice. This right is not subsidiary to any interest the Legislature as an institution might have had in *Eu*. This raises real doubts about whether the Legislature or the particular legislators in *Eu* "might fairly be treated as acting in a representative capacity," *Lynch v. Glass*, 119 Cal. Rptr. 139 (1975), and whether privity exists between the parties in the two actions.

Second, although I agree with the majority that "the relevant ballot materials and the surrounding context provided sufficient notice making it clear that Proposition 140 required lifetime bans," in the interest of balance, the record should be clear that the proponents of Proposition 140 have not exhibited complete consistency on this

point. In fact, they argued for the opposite conclusion before the California Supreme Court.

Schroeder, Circuit Judge, dissenting in part:

I agree that the district court must be reversed and the injunction vacated. I respectfully disagree with the majority's holding that we should reach the merits of the constitutional controversy. The California Supreme Court has already decided it. *Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991). The majority correctly recognizes that res judicata would ordinarily bar relitigation of such issues, but incorrectly concludes that the California Supreme Court would apply a "public interest" exception to permit relitigation.

Under the Full Faith and Credit Act, we must give the state court judgment the same preclusive effect that the California Supreme Court would afford it. U.S. Const. art. IV, § 1; 28 U.S.C. § 1738; *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984). There is nothing in California law to suggest the California Supreme Court would decide to revisit the same case it decided a few years ago, particularly when no intervening federal cases would compel it to change its analysis.

The majority cites *Kopp v. Fair Political Practices Comm'n*, 905 P.2d 1248, 1256 (Cal. 1995). There, the California court applied its public interest exception to consider in the first instance whether to reform a state statute that a federal court had held unconstitutional. There had been no prior state litigation. Thus, California had a considerable public interest. There is no similar public

interest to be served in this case by relitigating the identical claims that the same state court earlier decided.

The panel majority circumvented res judicata by a different route. It held that the particular legislators and voters who are plaintiffs in this case were neither parties to the state court litigation, nor in privity with those parties. The majority in my view correctly, albeit implicitly, recognizes that the panel's position is not sound. Identical voter and legislator interests were asserted by the parties in the earlier litigation, and the plaintiffs in both actions were represented by the same counsel. I believe the California courts would hold that the Legislature and voters in *Eu* acted in a representative capacity for the plaintiffs in this case, and that they are therefore privies barred by the doctrine of res judicata. *See Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 122 P.2d 892 (Cal. 1942).

I would reverse and remand for dismissal of the federal action. I would not decide the merits.

FLETCHER, Circuit Judge, with whom Circuit Judge Pregerson joins, Concurring in Part and Dissenting in Part:

The majority today decides questions of great importance: May a State, consistent with the Constitution, impose a lifetime term limitation upon elected officials for state office, and, if so, how may the State go about enacting such a restriction? These are questions of first impression among the federal courts of appeal. With regret, I must conclude that the majority has not given them the careful consideration that they deserve.

I.

The State of California argues, as do Judge Rymer and Judge Schroeder, that the question of the constitutionality of Proposition 140 is res judicata as between the parties to this action, and that we should not reach the merits of the plaintiffs' claims. It is, of course, well established that federal courts must give full faith and credit to a valid judgment rendered by a state court of competent jurisdiction. *See* 28 U.S.C. § 1738. More precisely, a federal court must accord such a judgment the same preclusive effect that it would receive in the rendering state. *See Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 877 (1996). California and Judges Rymer and Schroeder argue that the parties to the present action are the same parties that challenged the constitutionality of Proposition 140 in *Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991), or at least that they were in privity with the plaintiffs in that case, and hence that they should be bound by the judgment of the California Supreme Court, and their present claims should be barred. Without deciding whether Bates and the other plaintiffs are actually bound by the *Eu* decision, the majority concludes (as did the three-judge panel, in an alternative holding on the question) that California would apply its "public interest" exception to res judicata if this case were brought in state court, and so res judicata is no bar to the present action. *See supra*, majority opinion at 5-6; *Bates v. Jones*, 127 F.3d 839, 850-51 (9th Cir. 1997). I continue also to subscribe to the panel majority's opinion that these plaintiffs are not barred by res judicata because they were not parties to the prior state court proceeding. *See id.* at 848-49.

This leads me to respond to Judge Rymer's disagreement on this point contained in her separate concurrence

on this issue. Judge Rymer invokes the *Rooker-Feldman* doctrine, *see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), in order to argue that the district court had no jurisdiction even to hear Bates' challenge to Proposition 140. In doing so, she apparently argues that, when the highest court of a state issues a ruling on the constitutionality of a state statute, the *Rooker-Feldman* doctrine prevents lower federal courts from ever conducting an independent review of the statute's constitutionality, regardless of whether the parties before the federal court are different from the parties in the prior state court proceeding. The majority properly declines to embrace this extraordinary proposition, which constitutes a serious misreading of the *Rooker-Feldman* doctrine.[1]

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[1] Throughout the course of this litigation, California has vigorously advanced the position that "state courts are not bound by lower federal appellate court decisions on federal questions." Petition of the State of California for a Writ of Certiorari, filed Sept. 11, 1997, at 17. Among many other cases, the State has cited *Rooker* in support of this position. *See id.* at 24. It is not clear to me whether Judge Rymer, in arguing that states can foreclose review of federal questions by federal courts, means to incorporate this position into her argument. Since she does not do so explicitly, I will not respond to that position at length. I do note, however, that the practical effect of the argument that Judge Rymer advances in her concurrence is that *lower federal courts* would be bound by *state court* decisions on federal questions. If we assume, for the sake of argument, that California is correct in its assertion that "state courts are not bound by lower federal appellate court decisions on federal questions," *id.* at 17, then surely the State could not be heard to argue that the converse would not also be true. What is good for the goose is good for the gander.

A.

As Judge Rymer correctly explains, the *Rooker-Feldman* doctrine holds that federal courts have no jurisdiction to engage in appellate review of the merits of state court judgments. With some exceptions that are not relevant here, the jurisdiction of federal district courts is original, not appellate. *See* 28 U.S.C. § 1331. Congress has reserved the duty to hear appeals from individual state court judgments, even on issues of federal constitutional law, exclusively to the U.S. Supreme Court in our judicial system. *See* 28 U.S.C. § 1257; *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 221 (9th Cir. 1994).

Because it is a doctrine concerning the integrity of individual judgments, *Rooker-Feldman*, like the doctrine of res judicata, is applicable only when the parties in a second action were also parties, or in privity with parties, in a previous state court proceeding. It is well established that "one is not bound by a judgment *in personam* in a litigation in which [one] is not designated as a party," unless it is through a privity relationship or a certified representative. *Richards v. Jefferson Cty., Ala.*, 116 S. Ct. 1761, 1766 (1996). Someone who is not a party to an action cannot, of course, request appellate review of that action. *See, e.g.*, Fed. R. App. Proc. 3(c) ("A notice of appeal must specify the party or parties taking the appeal.") By the same token, someone who was not a party to a state court action cannot be charged with attempting to seek "appellate review" of that action, within the meaning of *Rooker-Feldman*, by bringing a separate action in federal court that happens to address issues that are similar or identical to the issues decided in the state court proceedings. The *Rooker-Feldman* doctrine prevents federal courts from

reviewing state court *judgments*; it does not prevent federal courts from deciding *issues* that happen previously to have been decided in unrelated state court proceedings.

One might well ask what the difference is between the *Rooker-Feldman* doctrine and traditional principles of res judicata. In many cases, the answer will be that the difference is a purely formal one. As Judge Easterbrook has recently written, "a judgment that is not entitled to full faith and credit does not acquire extra force via the *Rooker-Feldman* doctrine." *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1350 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc). This observation holds true both in cases where a party claims that the state proceeding that produced a challenged judgment suffered from a constitutional infirmity (the type of claim that Judge Easterbrook was analyzing in *Kamilewicz*) and in cases where a party claims that the state court judgment should not bar her action in federal court because it would not bar the same action in a court of the rendering state. Thus, in most cases, the difference between the *Rooker-Feldman* doctrine and the principle of res judicata amounts to the difference between asking a federal court to review the merits of a binding state court judgment and asking a federal court to address the same issues *de novo* without reference to the prior judgment. If a party comes to federal court and asks to be relieved of a state court judgment because it was wrongly decided, *Rooker-Feldman* directs the district court to respond that it has no jurisdiction to engage in such review. If the same party comes into federal court and simply pleads the

same claims that were decided in the state court judgment, without making reference to that judgment or asking the district court to review its merits, the Full Faith and Credit Act would require the federal courts to recognize the affirmative defense of res judicata when a defendant interposes the state court judgment as a bar to the plaintiff's claims.[2]

It is difficult to articulate a general rule for identifying the circumstances under which the applicability of *Rooker-Feldman* and of res judicata are not essentially coextensive. This may be what inspired a leading commentator in the field of Civil Procedure to describe the *Rooker-Feldman* doctrine as "somewhat peculiar." Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 Sup. Ct. Rev. 219, 283 n.122. Perhaps the best explanation of the *Rooker-Feldman* doctrine is to be found by examining the highly unusual interplay between state and federal courts that obtained in the *Feldman* case itself.

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[2] The difference between these two situations, while largely formal, is significant. If a district court were to engage in "appellate review" of a state court judgment, the result would be that the state court judgment would be vacated. If a district court were to disregard a state court judgment for res judicata purposes, however, the judgment would remain in existence at the close of the federal proceedings. This distinction maps onto the difference in the control that parties exercise over each doctrine: res judicata is a waivable defense, while infirmities to a court's subject-matter jurisdiction (including *Rooker-Feldman* review) are not. *Compare Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 328 (9th Cir. 1995) (res judicata), *with Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978) (subject-matter jurisdiction).

Feldman arose out of the refusal by the District of Columbia Court of Appeals to admit Feldman to the practice of law in that jurisdiction. The Court of Appeals in the District had a blanket rule against admitting individuals, like Feldman, who had not attended an accredited law school, and it refused to make an exception in Feldman's case. *See Feldman*, 460 U.S. at 465-70. The "judgment" that Feldman challenged in federal district court was the refusal by the state court[3] to grant him an exception and admit him to the D.C. bar. On review, the Supreme Court held that the denial of Feldman's petition did in fact constitute a "judgment" within the meaning of 28 U.S.C. § 1257, and hence that review of that denial could be had, if at all, only in the U.S. Supreme Court. *See id.* at 479-82, 486-88.

What is unusual about *Feldman* is that the claim of right in that case – the denial to a particular applicant of admission to a state bar – involved a matter of policy that was under the exclusive control of the *court*. A claimant has occasion to challenge his denial to the bar of a state only after denial of admission by the state court itself. Since the Court found in *Feldman* that a denial of admission to the bar constitutes a "judicial proceeding," *id.* at 479-82, such denials form a unique class of cases in which every claimant will always already be saddled with an unfavorable state court "judgment" before ever being

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[3] For purposes of appellate review under 28 U.S.C. § 1257, the local courts of the District of Columbia are treated as state courts. *See* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 172(a) (1), 84 Stat. 590; *see also Feldman*, 460 U.S. at 403-04.

able to claim that he has been improperly denied admission.

In explaining that federal district courts have no jurisdiction to review decisions in this class of cases, the Court carefully distinguished between "general challenges to state bar admission rules and claims that a state court has unlawfully denied a particular applicant admission." *Id.* at 485. It is only in the latter class of cases, the Court explained, that an erroneous decision by the state court is, as it were, an element of the petitioner's claim of right. In contrast, a claimant can bring a general challenge to the rules promulgated by a state without first obtaining a "judgment" under those rules. Therefore, 28 U.S.C. § 1257 poses no barrier to a district court exercising jurisdiction over such a challenge.

> Challenges to the constitutionality of state bar rules . . . do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a judicial proceeding. If this is the case, the district court is not reviewing a state-court judicial decision. In this regard, 28 U.S.C. § 1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States district court review of final state-court judgments are not implicated. United States district courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require

> review of a final state-court judgment in a particular case. They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decision may be had only in this Court. 28 U.S.C. § 1257.

Id. at 486.

Thus, the impetus behind the Court's decision in *Feldman* is its identification of a class of cases in which res judicata will *always* constitute a defense to a party's attempt to bring a claim in federal district court, because the nature of the claim is such that it never arises except as the *result* of a judicial proceeding in a state court. As the *Feldman* Court explains, 28 U.S.C. § 1257 strips the federal district courts of jurisdiction over this unusual class of claims, depriving parties of the opportunity to bring their fruitless, always-already-barred claims in that forum.

B.

Judge Rymer reads *Feldman* much more broadly. She argues that, under *Rooker-Feldman*, the California Supreme Court's decision in *Eu* prevents the lower federal courts from ever reviewing the constitutionality of Proposition 140. Since a decision by a federal court on the constitutionality of a state statute would "effectively . . . 'overrule' " the merits of a decision by a state court regarding the same statute, Judge Rymer argues that the federal courts are disabled from ever reviewing the statute once a state court has rendered a final decision

on the matter. *See supra,* Rymer concurrence at 5. So long as "the constitutional challenge raised in the federal court was 'inextricably intertwined' with the state court's decision," *id.*, Judge Rymer would hold that state courts can permanently foreclose review of state statutes in lower federal courts.

Where Judge Rymer goes seriously wrong is in losing sight of the importance of the identity of *parties* to the application of the *Rooker-Feldman* doctrine. As the Third Circuit has explained, "*Rooker-Feldman* does not bar individual constitutional claims by persons not parties to earlier state court litigation." *Valenti v. Mitchell,* 962 F.2d 288, 298 (3d Cir. 1992); *see also Dubinka,* 23 F.3d at 221 (Under *Rooker-Feldman* analysis, "we must determine whether [a] constitutional claim [is] 'inextricably intertwined' with [a] state court's rulings *in a particular plaintiff's case.*") (emphasis added). "[T]he interests served by *Rooker-Feldman* are quite similar to those served by giving a state court judgment res judicata effect in a subsequent federal proceeding." *E.B. v. Verniero,* 119 F.3d 1077, 1091 (9th Cir. 1997). Thus, the identity of the parties in similar state and federal proceedings is vital to determining what effect, if any, the *Rooker-Feldman* doctrine will have upon the jurisdiction of a federal district court. Where A and B bring a challenge to the same state statute in the same federal court proceeding, and A, but not B, has already brought a similar challenge against the same party in state court, then *Rooker-Feldman* may deprive lower federal courts of jurisdiction to hear A's claim, but it will have no impact on their jurisdiction to hear B's claim. This was precisely the result that obtained in *Verniero,* in which the Third Circuit was called upon by two different

sets of litigants to review the constitutionality of "Megan's law," a compulsory notification law for sex-offenders. That court found that *Rooker-Feldman* deprived the federal courts of jurisdiction over the claim of one litigant, who had already obtained a judgment on the same claim in state court, but had no impact on the claims of other litigants who had not previously brought suit.

There can be no doubt that a federal court's pronouncement on the constitutionality of a state statute will have a serious impact on the vitality of previous state-court judgments concerning the same issue. But a litigant cannot invoke the *Rooker-Feldman* doctrine to prevent a federal court from "reviewing the merits" of a prior state judicial proceeding unless (at a minimum) he and his opponent were both parties to that proceeding, just as a litigant cannot raise a defense of res judicata by interposing an earlier judgment unless (at a minimum) his opponent is personally bound by that judgment. It is true that state and federal courts sometimes reach contrary conclusions as to the constitutionality of state statutes. Such clashes are unfortunate, and, as Judge Rymer rightly points out, it is sometimes appropriate for federal courts to abstain from deciding such issues in order to give states a chance to interpret their own statutes and thereby possibly to avoid constitutional problems. *See supra*, Rymer concurrence at 5 n.1; *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). But the *Rooker-Feldman* doctrine, like the principle of res judicata, is concerned only with preserving the integrity of individual state court judgments, binding upon *particular parties*, from improper review by lower federal courts. Judge Rymer's

attempt to transform this extremely narrow doctrine into an instrument for restructuring the entire relationship between state and federal courts is both unfortunate and misguided.

II.

Given the importance of the right of the citizenry of a state to decide the form that its government will take (within the constraints imposed by the Federal Constitution in Article IV section 4, the Fourteenth Amendment, and elsewhere), I should not think it a remarkable proposition that, when the citizenry is asked to bring about profound changes in that government through a popular referendum, it must have adequate notice of what those profound changes will be. I do not suggest that such a vote may be invalidated simply upon proof that the voters do not understand, or have not made the effort to understand, the meaning of the initiative measure upon which they cast their votes.[4] I *do* suggest that such a vote must be invalidated when the state does not provide

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[4] Judge O'Scannlain purposefully misinterprets my argument. He asserts that I impose a test that would require federal courts to examine whether voters "were capable of understanding what they voted for." *Supra*, O'Scannlain concurrence at 15. He facetiously notes that he finds no "ignorant voter clause" in the Constitution. Of course, I do not either. Adequate notice is a requirement to assure that the voter has information from which the voter *can* make an informed judgment. Even the most intelligent and diligent voter must be informed of the intent and effects of that upon which he casts his ballot.

information sufficient to allow any voter to know what it is that he is voting for.

Judge Rymer makes an important point. The initiative in this case deals with an issue of critical importance to the voters of the state: who will govern, citizen legislators or career legislators. While we may question the wisdom of submitting to the initiative process matters that might be better suited to the regular legislative process that is contemplated by traditional notions of republican government, this issue is, quintessentially, one that *should* be decided by a citizen vote (restricted, of course, by the demands of the Constitution). It is precisely because the issue before us is of such importance that we must ask whether the voters were given adequate notice of the essentials of the measure. It is in this context that the three-judge panel majority paid close attention to the information furnished by the state.

Several aspects of this litigation have tended to obscure the thoughtful attention that the important issues presented here should receive. Timing is the enemy of us all. Unfortunately, the political ramifications of this case have brought about unseemly haste, to the detriment of the deliberative process. In addition, the State of California has fundamentally shifted its position between its appearances before the California Supreme Court and before our court, leaving it in an awkward position, to say the least. Before the Supreme Court of California, the State vigorously argued that the initiative did *not* impose lifetime bans and urged the Supreme Court of California to ensure the constitutionality of the initiative by construing it to impose restrictions only on consecutive terms.

The opponents of the initiative asserted that it was unconstitutional *because* it imposed a lifetime ban.

Now, before the federal courts, the State of California asserts two propositions: First, that the drafters of the initiative *intended* that it impose lifetime bans; but second, that a certain degree of ambiguity about the matter is not disqualifying and indeed may be injected purposefully to garner broader support from the voters. It is in this context that I respond to the majority's cursory dismissal of the important issue of the adequacy of the notice to the voters in this case, and to Judge O'Scannlain's suggestion that voters need not be given the information necessary to understand the implication of their votes.

A.

The majority holds that the voters of California received adequate notice that, by voting in favor of Proposition 140, they were voting in favor of a lifetime ban. The majority opinion in the decision by the three-judge panel of this court more fully explains my opposition to that position. *See Bates*, 127 F.3d at 856-63. However, I add the following comments specifically in response to the majority's and Judge O'Scannlain's analyses.

The majority opinion is incorrect in its assertion that its holding, that the voters received adequate notice of the effect of Proposition 140, is "consistent with the California Supreme Court." Despite Judge O'Scannlain's implication to the contrary, the California Supreme Court did not rule on whether or not the voters received adequate notice; rather, the court answered only "the interpretive question whether Proposition 140 imposes a

'lifetime ban'." *Eu*, 816 P.2d at 1314. The task of determining whether or not the voters received notice is fundamentally different from the task of interpreting the meaning of a voter initiative; in the latter context, the California Supreme Court acknowledged that it was concerned only with what the "average" voter "likely" believed. *Id.* at 1316. Not surprisingly, in making that assessment, the California Supreme Court explicitly admitted that "Proposition 140 is ambiguous as to its intent to impose a lifetime ban." *Id.* at 1315. It made this statement notwithstanding the State of California's contrary assertion that Proposition 140 "by its terms . . . only limits the number of successive terms which incumbents in the elective offices may serve." Respondents' Brief in *Legislature v. Eu* ["*Eu* Brief"] at 4. Surely the adequacy of notice cannot turn on what a person of average intelligence "likely" understood regarding an admittedly ambiguous initiative; notice regarding the effect of one's vote requires clarity, *see e.g., United States v. Bass*, 404 U.S. 336, 349 (1971); "careful and purposeful consideration," *Greene v. McElroy*, 360 U.S. 474, 507 (1959); or "considered evaluation," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 115 (1976).

The majority also inappropriately looks to the twenty-second amendment to the United States Constitution for support of its position. The twenty-second amendment states that "[n]o *person* shall be elected to the office of the President more than twice. . . . " U.S. Const. amend. XXII (emphasis added). By contrast, Proposition 140 stated, "[n]o *Senator* may serve more than 2 terms," and "[n]o *member of the Assembly* may serve more than

two terms." (emphasis added). As the state itself pointed out, this distinction has a specific meaning:

> This verbal distinction between restrictions on the incumbent office-holder and restrictions on the individual person who at one time holds the office may be found in the constitutions of 18 states which impose term limitations upon their Governors. In each constitution, a restriction on the incumbent while he is an incumbent uses the title of the office . . . while a restriction on the individual which extends after he leaves the office uses the word "person." . . . [The state] knows of no constitution in which the title of an office is used to designate a person after he no longer holds that office.

Eu Brief at 23-24 n.11. Thus, the wording of the twenty-second amendment actually supports the opposite position from that advocated by the majority today. At the very least, it creates a serious question as to the intended meaning of Proposition 140, despite the majority's position that the meaning was clear to the voter.

The majority's reliance on the statements found in the materials distributed by those opposing Proposition 140 is also puzzling. While the opposition did suggest that the enactment of Proposition 140 would result in a lifetime ban, the state and those in favor of Proposition 140 never responded to that allegation. The State in fact never stated to the voters that a lifetime ban was the intent or the effect of the measure. As the state acknowledged, "this is not particularly surprising" since it allowed the supporters of Proposition 140 to "benefit from the ambiguity." *Eu* Brief at 21. Indeed, the state in oral argument before the en banc court went so far as to

suggest that the voters have a *right* to vote for ambiguous legislation. Given the state's explicit admission that the state benefits by purposefully refusing to clarify the meaning and effect of an initiative on the ballot, I am amazed that the majority could find that the voters received adequate notice that by voting in favor of Proposition 140, they knew that they were voting to enact a lifetime ban.

Finally, the "surrounding circumstances" did not provide notice to the voters that they were enacting a lifetime ban. The majority relies upon the fact that the voters had two initiatives to choose from on the ballot – Proposition 140, and Proposition 131. Proposition 131, among other things, imposed consecutive term limit bans. The majority concludes from this fact that voters therefore must have known that because Proposition 131 involved consecutive term limit bans, Proposition 140 involved lifetime bans. I respectfully disagree. As the state itself argued, "[i]t simply cannot be said that the voters rejected Proposition 131 solely because the term limitation provisions of that measure" imposed a consecutive rather than a lifetime ban. *Eu* Brief at 25 n.13. Proposition 131 "covered several, complex issues" and was different from Proposition 140 in significant ways concerning funding and revenues. While editorials and the opponents' materials compared the effect of the two propositions in terms of the severity of the term limitations imposed by each, it cannot be said that such materials constitute "notice," particularly in the face of not a single reference to a lifetime ban in the text of the amendment,

the proponents' ballot arguments, or the official statement prepared by the state.[5]

B.

The evidence upon which the majority relies suggests at best that some of those who voted in favor of or against Proposition 140 believed that by doing so, they were voting in favor of or against a lifetime ban.[6] It necessarily follows, however, that others who voted in favor of or against the proposition had no notice that they were voting in favor of or against a lifetime ban and so

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[5] The majority's reliance on *Taxpayers to Limit Campaign Spending*, 799 P.2d at 1220, is misplaced. In that case, the California Supreme Court considered what to do when two voter initiatives, both dealing with campaign finance, received more than 50 percent affirmative votes. The court held that no part of the ballot initiative receiving the fewer affirmative votes could take effect. 799 P.2d at 1221. While that ruling apparently was interpreted by the press as potentially affecting what would happen if both Proposition 131 and Proposition 140 were passed, that does not constitute notice that Proposition 140 involved a lifetime ban.

[6] I also note that some of the evidence relied upon by the en banc majority was not relied upon by the California Supreme Court, despite the majority's statement that its decision is "consistent" with that of the California Supreme Court. The latter looked only to the Legislative Analyst's analysis and the opponents' materials in interpreting the meaning of Proposition 140 and concluding that it imposed a lifetime ban. *See Eu*, 816 P.2d at 1315. The California Supreme Court specifically rejected the notion that the wording of the amendment made it clear what type of ban was contemplated by Proposition 140. *See id.* Nor did the *Eu* court look to the effect of having Proposition 131 on the same ballot, or to the attention Proposition 140 received from the media.

had no notice that they were voting on a severe limitation to their fundamental right to vote for candidates of their choice. *Reynolds*, 377 U.S. at 555. We ask little of the state when we request that it give voters adequate notice of the effect of their vote, particularly when the state asks voters to restrict their own fundamental rights. In contrast, the state loses little when we take away the advantage it gains by fostering an ambiguity as to the effect of a voter initiative.

As Judge Rymer's concurrence appropriately emphasizes, "decisions about how people are to participate in their own representative government and how they choose to represent themselves is 'the very essence of *all* self-government.' " *See supra*, Rymer concurrence at 9 (quoting Laurence H. Tribe, *American Constitutional Law* 398 (2d ed. 1988)) (emphasis in original). Ironically, however, the majority would have the voters of California make those decisions while having to guess at the likely outcome of their votes, having to rely upon newspaper editorials and materials circulated by the opponents of the voter initiatives, rather than upon the plain language of the initiative itself and the explanatory materials produced by the state. It is difficult to determine how the right to vote – particularly the right to vote on issues affecting one's own fundamental rights – can be meaningful when the state is allowed to force people to vote at their peril rather than add a few simple words to clarify the position for or against which they are being asked to cast their ballots.

III.

The majority disposes of the merits of petitioner's constitutional challenge to lifetime term limits in an opinion that barely spans one page of the federal reporter. The majority apparently believes that plaintiffs' challenge presents an easy question. I find the question to be an extremely difficult one.

A.

When a court is called upon to analyze the constitutionality of restrictive qualifications imposed by a state upon candidates for office, it faces a dilemma to which the Supreme Court has not yet offered any answer: How is the court to determine whether a qualification is a "proper" one or not? It seems clear that some qualifications are eminently "proper" and should not require any extraordinary justification by a State in order to survive scrutiny. A requirement that candidates be adults, for example, or that they actually reside in the districts that they seek to represent, fits with our understanding of the most basic of requirements in a representative democracy: That candidates for office be citizens who are willing and able to represent the interests of a particular community. Any constitutional analysis that would require a State to offer a highly particularized explanation for imposing basic age and residency requirements upon candidates for elective office would be extraordinarily invasive.

Even so, the Supreme Court has at least suggested that such an invasive analysis may be called for. On a

number of occasions, the Court has emphasized the "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.' " *Powell v. McCormack*, 395 U.S. 486, 547 (1969). "The people are the best judges who ought to represent them," the Court has written, and "[t]o dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 794-95 (1995) (quoting 2 Elliot's Debates 292-93 (statement of Robert Livingston)). Indeed, the Court has gone so far as to say that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and *any* restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (emphasis added). Taken literally, these ringing phrases would suggest that every attempt by a state to set restrictive qualifications concerning who can and who cannot serve as a candidate for elective office implicates rights that are "fundamental" and requires careful scrutiny by a reviewing court.

It will not do to respond that the Court has only meant to secure to voters the right to vote for the *qualified* candidate of their choice, for this merely begs the question, what qualifications may a State impose? By narrowing the field of candidates who are eligible to run for office, lifetime term limits might permanently deprive an entire legislative district of the opportunity to vote for the otherwise-"qualified" candidate of its choice, even if that district had overwhelmingly opposed the imposition of term limits in the first place. Ascertaining the constitutional principles that should govern such a dilemma is of

the highest importance. The qualifications for federal legislative office are absolutely fixed in the Constitution. *See* U.S. Const., Art. I § 2 cl. 2-3; *Thornton*, 514 U.S. at 837-38. There are no such clear constitutional guideposts for state legislators. Thus, unless the Court means for lower federal courts to take literally its stirring pronouncements concerning "[t]he right to vote freely for the candidate of one's choice," *Reynolds*, 377 U.S. at 555, these repeated, powerful statements do not aid in answering the basic question that is before us: How is the court to determine whether a qualification is a "proper" one or not?

The majority rests its conclusion that states may freely impose lifetime term limits upon state elected officials primarily upon its assertion that "term limits on state officeholders is a neutral candidacy qualification," one that "[does] not constitute a discriminatory restriction." Majority opinion at 8, 9. The majority looks to the Supreme Court's cases involving restrictions on candidate access to voting ballots for the proposition that "the State's important regulatory interests are generally sufficient to justify" such restrictions, provided that they are "reasonable" and "nondiscriminatory." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The majority concludes that Proposition 140 does not "limit[] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status," Majority opinion at 9 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)), and hence that lifetime term limits do not provoke any searching judicial scrutiny.[7]

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[7] Judge O'Scannlain vigorously urges the position that the Supreme Court's summary dismissal in *Moore v. McCartney* is such "compelling authority" for the issues before us that there is

I find the majority's analysis problematic, at best. In my view, *U.S. Term Limits v. Thornton* forecloses the analytical approach that the majority invokes. As the majority points out, *Thornton* involved a challenge to an attempt by the State of Arkansas to impose term limits on members of the U.S. Congress. That attempt raised serious concerns under the Qualifications Clauses, U.S. Const., Art. I § 2 cl. 2-3, concerns which are not implicated here, and the Court rested its holding in *Thornton* primarily upon its analysis of those particular concerns. During the course of its opinion, however, the Court also examined the Arkansas amendment in light of its ballot-access line of cases, finding that there was nothing in those cases that could save the challenged amendment. *See Thornton*, 514 U.S. at 834-35. That analysis is entirely at odds with the approach that the majority has adopted in this case.

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not even a federal question for us to decide and we should dismiss for want of jurisdiction. *See supra*, O'Scannlain concurrence at 1-8. Judge O'Scannlain's own presentation of his argument provides a sufficient basis for disregarding it, however. *Moore* was a case about consecutive term limits, not a lifetime ban. The petitioner in that case – the Governor – made no claims under the First Amendment; indeed, there were no voters joined as parties in the case at all, *see Maloney v. McCartney*, 223 S.E.2d 607, 610-11 (W. Va. 1976), raising a serious question as to whether the case presented a federal *voting rights* issue over which the Court could exercise jurisdiction. The case was a summary dismissal and has been followed by twenty years of First Amendment opinions in the related field of candidate restrictions. Judge O'Scannlain's only authority for the proposition that *Moore* should even inform the present inquiry is Justice Thomas' dissenting opinion in *Thornton*.

The State of Arkansas argued in *Thornton* that its attempt to impose term limits on members of Congress was in fact nothing more than a permissible exercise of its power, under the Elections Clause of the Federal Constitution, to regulate the "Times, Places and Manner" of federal elections. U.S. Const., Art. 1 § 4 cl. 1; *see Thornton*, 514 U.S. at 832. In rejecting that argument, the Court looked to its ballot-access cases and explained that the types of regulatory procedures that those cases involved (many of which constituted permissible regulations under the Elections Clause) were qualitatively different from the imposition of a qualification for candidacy in the form of a lifetime term limitation. As the Court explained, "[t]he provisions at issue in [the ballot-access / Elections Clause cases] were . . . constitutional because they regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position." *Thornton*, 514 U.S. at 835.

Once again, the imposition of qualifications upon state legislators does not implicate the interplay between the Qualifications Clause and the Elections Clause that the Court was primarily concerned with in *Thornton*. But the Court was quite clear in *Thornton* that its conclusion that the ballot-access cases could not save the Arkansas amendment relied *both* upon the nature and extent of the burden imposed by lifetime limits *and* upon the unique limitations embodied in the Qualifications Clause. Thus, the Court explained that its ballot-access cases "provide little support for the contention that a state-imposed ballot access restriction is constitutional when it is undertaken for the twin goals of *disadvantaging a particular class*

of candidates and evading the dictates of the Qualifications Clause." *Id.* at 835 (emphasis added). As to the former consideration, the Court explained that the types of ballot regulations that the Court has upheld in cases like *Burdick* are qualitatively different from "measures that exclude candidates from the ballot without reference to the candidates' support in the electoral process." *Id.*

The Court's analysis of its ballot-access cases in *Thornton* does not by itself require a finding that lifetime term limits on state legislators are unconstitutional. It does compel the conclusion, however, that such limits "disadvantag[e] a particular class of candidates." *Id.* There is no difference between the operation of state and federal term limits in this regard. Both "exclude candidates from the ballot without reference to the candidates' support in the electoral process." *Id.* The clear import of the Court's analysis in *Thornton* is that lifetime term limits cannot enjoy the deferential review that the ballot-access cases reserve to those procedural reforms that "impose only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters." *Burdick*, 504 U.S. at 434. Indeed, *Thornton* could be read for the broad proposition that the ballot-access cases are simply inapplicable to *qualification* regulations, of which lifetime term limits are an example. *See supra*, Rymer concurrence at 12. It at least stands for the narrower proposition that, even under the ballot-access cases, lifetime term limits have the effect of "disadvantaging a particular class of candidates," *Thornton*, 514 U.S. at 835, and hence provoke searching judicial review. *See Anderson*, 460 U.S. at 793. Under either interpretation,

Thornton forecloses the deferential approach that the majority has adopted in this case.

B.

Before going on to discuss the constitutionality of Proposition 140 under the stricter standard that *Thornton* requires us to employ, I think it appropriate to explore further the Supreme Court's conclusion that lifetime term limits discriminate against "a particular class of candidates." *Thornton*, 514 U.S. at 835. The majority in *Thornton* apparently took this to be a self-evident proposition, but, as the district court in the present case aptly observed, "the terms 'reasonable' and 'nondiscriminatory' [and their converse] are not self-defining." *Bates v. Jones*, 958 F. Supp. 1446, 1462 (N.D. Cal. 1997). Justice Kennedy took up this question in *Thornton* at somewhat greater length than did the majority, explaining that lifetime term limits had the dubious effect of burdening the rights of voters[8] based on the manner in which they had exercised the franchise in past elections.

> Not the least of the incongruities in the position advanced by Arkansas is the proposition, necessary to its case, that it can burden the rights of resident voters in federal elections by reason of the manner in which they earlier had exercised it. If the majority of the voters had been successful in selecting a candidate, they

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[8] As the Court has explained, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

> would be penalized from exercising that same right in the future.

Thornton, 514 U.S. at 844 (Kennedy, J., concurring). Justice Kennedy made this observation during the course of a discussion about the burden Arkansas had placed upon federal voting rights, but he also cited *Anderson* and suggested that the restriction raised "First Amendment concerns." *Id.* Indeed, the concern that Justice Kennedy expressed over a restriction on the right to vote or hold office that looks to "the manner in which [a voter or candidate] earlier had exercised" that right, *id.*, echoes the *Thorton* majority's suspicion of "measures that exclude candidates from the ballot without reference to the candidates' support in the electoral process." *Id.* at 835.

In its ballot-access cases, the Court has admonished federal courts to "examine in a realistic light the extent and nature of [candidate restrictions'] impact on voters." *Anderson*, 460 U.S. at 786 (quotation omitted). On the most basic level, as the district court in the present case observed, "Proposition 140 prevents [California voters] from expressing their political preference for candidates with legislative experience." *Bates*, 958 F. Supp. at 1463. "California voters who value legislative experience . . . are not simply required to defer expressing their preference, they are forever prevented from expressing their preference at the ballot box." *Id.* The district court found that this impact alone was enough to warrant strict scrutiny under *Anderson* and *Burdick*, a conclusion that was surely warranted in light of the Supreme Court's conclusion that lifetime term limits "disadvantag[e] a particular class of candidates." *Thornton*, 514 U.S. at 835.

Even so, this explanation, without more, is not wholly satisfactory. The implicit rejoinder of the majority's analysis is an attractive one, at least on its face. Term limits affect all candidates equally, without regard to the candidates' parties, their political affiliations, or their resources. Thus, on their face, term limits do not seem to disadvantage any particular class of *voters*, unless we can say that there are voters who value legislative experience, not merely for the incumbency-based benefits that it can confer upon fortunate districts, but as a political and ideological reason for selecting a representative. I do not doubt that there are some voters who value legislative experience for precisely this reason. It is not self-evident, however, that such voters constitute a "particular class." There surely are at least some voters who value candidates, on an ideological level, for reasons that would be implicated by the ballot-access restrictions that the Court has upheld in the past. I can easily imagine, for example, that there are voters (albeit few) who might have principled reasons for trusting only a candidate who refuses to take part in any organized balloting and primary activities, instead insisting that he be elected, if at all, by popular acclaim through the write-in process. *Cf. Burdick*, 504 U.S. at 435-36. How, then, is a court to decide, in a close case, when a restriction has the disfavored effect of "disadvantaging a particular class of candidates?" *Thornton*, 514 U.S. at 835.

I am persuaded that the animating force behind the Court's conclusion in *Thornton* that term limits have this effect is its observation that term limits "exclude candidates from the ballot *without reference to the candidates' support in the electoral process.*" *Id.* (emphasis added). The

regulations that the Court has upheld in its ballot-access cases have been aimed at "seeking to assure that elections are operated equitably and efficiently," *Burdick*, 504 U.S. at 433, and at "protect[ing] the integrity and reliability of the electoral process itself," *Anderson*, 460 U.S. at 788 n.9, even though they might, in theory, result in some voter's ideologically preferred candidate being excluded. What those restrictions have in common is that they have asked questions that relate to a candidate's level of engagement with the *electoral process*. Has the candidate made use of readily available methods of gaining access to the ballot? *See Burdick*, 504 U.S. at 435-36. Has the candidate demonstrated a threshold level of popular support? *See Munro v. Socialist Workers Party*, 479 U.S. 189, 192-93 (1986). Has the candidate identified himself with a particular party for purposes of a given election? *See Storer v. Brown*, 415 U.S. 724, 726-28. It is not enough, of course, for a candidate restriction to fit this general description. If the restriction burdens the rights of voters in too disparate or severe a fashion, it still may not pass muster. *See, e.g., Anderson*, 460 U.S. at 806. But this is the *type* of question that the ballot-access cases suggest that states ought to be asking in passing candidate restrictions. The candidate qualifications that I discussed at the beginning of this section – age and residency – would likewise merit deference under this approach. Clearly, residency requirements are directly concerned with the level of a candidate's engagement with a particular community. Similarly, people below a certain age do not enjoy all the rights and responsibilities of citizenship, and reasonable age requirements help to ensure that a candidate can fully

appreciate, and effectively represent, the most basic interests of his constituency.

What the Court suggested in *Thornton*, however, was that a "measure[] that exclude[s] candidates from the ballot without reference to the candidates' support in the electoral process," *Thornton*, 514 U.S. at 835, is asking the wrong type of question, at least as far as the ballot-access cases are concerned. A restriction that imposes a "substantive qualification rendering a class of potential candidates ineligible for ballot position," *id.*, *always* carries with it the danger that particular classes of voters will be disadvantaged, perhaps in ways that will be difficult to foresee. The ballot-access cases, *Thornton* suggests, represent a compromise under which states are permitted to pass restrictions aimed at protecting the electoral process, but only so long as those restrictions limit themselves to asking about a candidate's level of engagement and support in that process itself. *See id.* If the burdens that the restriction imposes are not too severe, then the restriction will enjoy a presumption of validity. If the restriction disadvantages candidates for reasons having nothing to do with a lack of engagement and support in the electoral process, however, then that presumption of validity disappears. At that point, the "fundamental principle . . . 'that the people should choose whom they please to govern them,' " *Powell v. McCormack*, 395 U.S. 486, 547 (1969), reasserts itself and requires courts to look closely at the challenged restriction. Such is the case with lifetime term limits, which prevent candidates from running for office precisely *because* they are engaged with the political process and have found considerable support in it. *See Thornton*, 514 U.S. at 844 (Kennedy, J., concurring).

We cannot accord such a regulation a casual presumption of validity. Rather, we must weigh it carefully against the interests that the State asserts in its defense.

C.

I recognize the uniquely compelling interest that states enjoy in experimenting with new forms of republican government under our federal system. Judge Rymer provides an account of that interest in her opinion that is powerful. *See supra,* Rymer concurrence at 9-11. As Justice Brandeis has famously written, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As Judge Rymer explains, this principle is applicable to political reform as well, for, "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991); *see supra,* Rymer concurrence at 10-11.

In this regard, a limitation on the number of terms that a candidate may serve in state government implicates federalism interests that pull in the opposite direction from the federalism interests implicated by a similar restriction on elected federal officials. As the Court explained in *Thornton,* it was of central concern to the Framers of our Constitution that the States enjoy a relationship to the federal government that would not vary from state to state in order that they might be unified into

a single, stable Republic. *See Thornton*, 514 U.S. 806-07. "Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure." *Id.* at 822. Rather, it is the bedrock of stability that our uniform federal government offers that in turn makes it possible for States to experiment safely with novel approaches to intractable social, economic and political problems. The principle of federalism thus weighs heavily in favor of allowing California to experiment with a government of "citizen legislators" like the one that Proposition 140 envisions.

It is necessary, however, to articulate some limitations on the ability of States to alter their structure of government on the strength of these federalism interests. Unfortunately, the ordinary paradigm of strict scrutiny analysis is not helpful in this regard. Once it is acknowledged that the States have a compelling interest in experimenting with new forms of government, the concept of "narrow tailoring" has limited application, for any novel governmental structure is, by definition, narrowly tailored to the goal of experimenting with that particular governmental structure. But the States do not have a completely free hand in choosing how to organize themselves. That is why the question before us has no easy solution.

It is clear, at the very least, that a State cannot discriminate in an invidious fashion against its citizens, even in the name of sovereignty and federalism. *See Ashcroft*, 501 U.S. at 460. Disadvantaging candidates on the basis of their political ideology would unquestionably constitute

such "invidious discrimination." I have said that I am not convinced that favoring candidates on the basis of legislative experience constitutes a sufficiently distinct "political ideology" to warrant the invalidation of term limits as an invidious candidate qualification. I consider the question a close one, however. Several members of our court for various reasons would not reach the issue in this case, nor would I, in light of my view that the process that produced Proposition 140 was infirm. It is a question that, ultimately, the Supreme Court must address, and its decision will be a weighty one. Where along the fulcrum the balance lies is not easy of resolution.

I take the occasion here, however, to express my further discomfort with any ruling that would permanently foreclose a court from concluding, after seeing term limits in action, that they were wrong: that a preference for legislative experience does, in fact, constitute a genuine and distinct voter preference or political ideology, and that lifetime term limits have deprived an identifiable group of voters of the opportunity to elect representatives who will represent their interests and promote their political ideals.

When "there is a serious factual controversy over the feasibility of recognizing [a] claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power," *Washington v. Glucksberg*, 117 S. Ct. 2258, 2292 (1997) (Souter, J., concurring), it may sometimes be appropriate for federal courts to deny a claim of right while remaining open to reaching a different conclusion if a demonstrable infringement on individual liberties can later be shown.

This principle holds especially true when the organization of our federal system is at issue, since one of the very purposes of that system is to foster investigation and experimentation by state legislatures. *See id.* at 2293 (Souter, J., concurring); *Glucksberg*, 117 S. Ct. at 2303 (O'Connor, J., concurring). At a minimum, I suggest that the majority should recognize that what it does today is to validate an experiment that may not prove out. If experience demonstrates that the predicate that underlies the majority's decision is incorrect, and that lifetime term limits consistently disadvantage a particular class of voters on the basis of an articulable political ideology, then our court should remain open to revisiting its holding.

* * *

I voice my strong dissent from the majority's view that the voters of California received adequate notice from the State regarding the true import of their vote on Proposition 140. From reading their opinion, one might conclude also that the majority did not appreciate either the gravity or the closeness of the issues upon which they were called to deliberate.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Bill JONES, Secretary of the State of California, Defendant-Appellant, and Peter F. Schabarum; Lewis K. Uhler, Intervenors-Appellants, v. Tom BATES; Edward H. Lyman; Richard D. Lewis; Lawrence J. Buchalter; Jonathan Browning; Rachel Sherman, Plaintiffs-Appellees, and National Tax Limitation Committee; Alliance Of California Taxpayers & Involved Voters, Intervenors, v. Bill JONES, Secretary of the State of California, Defendant-Appellant.	No. 97-15914 D.C. No. 95-CV-02638-CW **OPINION**

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted August 7, 1997.
San Francisco, California

Filed October 7, 1997

Before: SNEED, FLETCHER, and REINHARDT, Circuit Judges.

Opinion by Judge Reinhardt

REINHARDT, Circuit Judge:

This case involves a deep and seemingly intractable conflict between principles at the heart of our representative government: the right of the people to choose whom they please to govern them, and the authority of a state to determine the structure of its political system. It also raises the novel question whether, when the people vote on an initiative measure that, if enacted, would severely limit a fundamental, constitutional right, they must be given adequate notice of the measure's effect.

In 1990, by a narrow margin, California voters passed Proposition 140, which, as construed by the California Supreme Court, amends the California Constitution to impose a *lifetime* limit on the number of terms that an individual may serve in state legislative office. The plaintiffs in this case – who consist of former state legislators who are permanently barred by Proposition 140 from ever seeking re-election to the house in which they served, and residents of their respective districts who can never again vote to re-elect state legislators barred by Proposition 140 – together allege that Proposition 140's

lifetime term limits impose an unconstitutional burden on their fundamental rights of voting and association under the First and Fourteenth Amendments. The district court agreed and invalidated the provision.

We affirm the judgment, but not the rationale, of the district court. We do not decide whether a state may adopt lifetime term limits for its legislators without violating the Constitution. We recognize that the state has a compelling interest as a sovereign in choosing the structure of its institutions and the qualifications of its officials – an interest that *may* suffice to render lifetime term limits constitutional, although we do not decide that question here. Instead, we invalidate the challenged lifetime ban because we hold as a matter of federal constitutional law that a state initiative measure cannot impose a severe limitation on the people's fundamental rights when the issue of whether to impose such a limitation on those rights is put to the voters in a measure that is ambiguous on its face and that fails to mention in its text, the proponents' ballot arguments, or the state's official descriptions, the severe limitation to be imposed. Neither Proposition 140, the proponents' ballot arguments, nor the material prepared by the state mentioned "lifetime" term limits; thus, the voters were not afforded adequate notice of the severity of the limitation involved.

BACKGROUND

On November 6, 1990, California voters narrowly passed Proposition 140, which amended the California Constitution to limit the number of terms that individuals may serve in certain state offices, to curtail the retirement

benefits of state legislators, and to reduce or eliminate legislative staff and support services. Cal. Const. art. IV, § 2(a) (term limits for state legislators); *id.* § 4.5 (retirement benefits for state legislators); *id.* § 7.5 (operating expenses of legislature and compensation of legislature members and staff); *see also id.* art. V, § 2 (gubernatorial term limits); *id.* art. v, § 11, art. IX, § 2, art. XIII, § 17 (term limits for other state executive officials). Although other state offices were affected, the thrust of the measure was clearly aimed at adopting term limits for the state legislature.[1]

There are two kinds of term limits: consecutive term limits and lifetime term limits. Consecutive term limits restrict the number of terms that a representative may serve *in a row.* Under this approach, which is employed by a majority of the states that have adopted legislative term limits,[2] legislators generally may return to office after a reasonable hiatus. While consecutive term limits force successful incumbents to step down from office

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[1] Although the measure contains a number of other provisions, it is obvious that the measure's primary focus is the legislative-term-limits provision. The term-limits provision is the first item mentioned in the measure's title, the measure itself, and in the ballot arguments. In fact, the measure's proponents dedicated seven and one-half of its ten-paragraph ballot argument to debating the merits of legislative term limits (without mentioning that the limits to be imposed by the measure were lifetime). Moreover, as the proponents emphasized, legislators constitute 120 of the 132 elected officials affected by the term limits.

[2] Excluding California, 14 of the 20 states that have term limits employ consecutive term limits. *See Bates v. Jones,* 958 F. Supp. 1446, 1454 n.5 (N.D. Cal. 1997) (collecting state laws).

after some fixed period of service (usually after two or three terms), they allow voters to re-elect those same persons at a future time, when they no longer have the advantage of incumbency. Lifetime term limits, on the other hand, are far more restrictive. Once a legislator has served a given number of terms as a senator or assemblyman, voters are barred *for life* from ever again electing that person to such office.

California proposed and adopted its term limits by means of the state's initiative process. *See* Cal. Elec.Code § 9000 et seq.; § 13280-82. Because Proposition 140 was a proposed constitutional amendment, the proponents were required to present to the Secretary of State a petition signed by eight percent of the state's registered voters. *See id.* § 9035. After doing so, the state prepared a "ballot pamphlet," which was sent to all registered voters. *See id.* § 9094. The ballot pamphlet contained a complete copy of the measure; an official title and summary of the Proposition prepared by the Attorney General; an official analysis prepared by the Legislative Analyst; and "ballot arguments" by the proponents and opponents for and against the measure. *See id.* §§ 9084-86.[3]

The official title of Proposition 140 as it appeared in the ballot pamphlet read: "Limits of Terms of Office, Legislators' Retirement, Legislative Operating Costs. Initiative Constitutional Amendment." The Proposition

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[3] Ballot arguments are arguments written by the proponents and opponents of an initiative, advocating the pros and cons of the measure. *See id.* §§ 9041-42. They cannot exceed 500 words. *Id.*

itself commenced with the following preamble, which is part of the constitutional amendment:

> The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.
>
> The ability of legislators to serve unlimited number of terms [sic], to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent.
>
> To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

Cal. Const., art. IV, § 1.5 (as amended). The Proposition, in relevant part, proposed to amend the California constitutional provision governing legislators by adding the following language:

> No *Senator* may serve more than 2 terms.
>
> . . . No *member of the Assembly* may serve more than 3 terms.

Cal. Const. § 2(a) (as amended) (emphasis added). Nowhere in the initiative, the title and summary, the Legislative Analyst's statement, or the proponents' ballot arguments, was there any mention of lifetime limits.[4]

On the November 6, 1990 general election, the measure was put to a statewide vote. The following language appeared on the ballot:[5]

> TERMS OF OFFICE. LEGISLATURE. INITIATIVE CONSTITUTIONAL AMENDMENT. Limits: terms for specified state elected officials, legislators' retirement, pensions. Legislature's operating costs. . . . Yes ___. No ___.

The measure passed by a statewide margin of 52.17% to 47.83%.

In 1991, a group of petitioners consisting of the California Senate and Assembly, a number of individual legislators, and individual constituents challenged the validity of Proposition 140 directly in the California Supreme Court by way of a petition for writ of mandate.

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[4] By contrast, the state of Oregon's constitutional provision imposing a lifetime ban reads: "No *person* shall serve more than six years in the Oregon House of Representatives, eight years in the Oregon Senate, and twelve years in the Oregon Legislative Assembly in *his or her lifetime*." Ore. Const., art. II, § 19, cl. 1 (emphasis added).

[5] The remaining ballot language described the predicted financial impact of the measure, as required by California law. The actual text of the measure appeared nowhere on the ballot.

Legislature v. Eu, 54 Cal.3d 492, 816 P.2d 1309 (1991). Neither Tom Bates nor any of his constituents was a party to the *Eu* action. Because the California Supreme Court chose to exercise its original jurisdiction, no trial was conducted, and no lower court examined the merits of the parties' legal and factual contentions. *Id.* at 500.

Petitioners contended that the Proposition was unconstitutional because it imposed *lifetime* term limits. The state of California[6] argued that Proposition 140 did not contain a lifetime ban and that it merely prohibited a "Senator" or "member of the Assembly," rather than a "person," from seeking re-election; the state contended that once an incumbent-legislator has left office "he or she can no longer be described as a 'Senator' or 'member of the Assembly' to which the term limitation provision would apply." *Id.* at 504. The state further urged that "a lifetime ban on candidacy is not essential to accomplish the voters' purpose," and that a narrow interpretation of Proposition 140 would "avoid[ ] conflict with the Constitution" and be "less intrusive of constitutionally protected rights." Applying a highly deferential state-law standard that requires it to adopt "all presumptions [in] favor [of] the validity of initiative measures" and to uphold such measures "unless their unconstitutionality clearly, positively, and unmistakably appears," *id.* at 501,

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[6] For simplicity, we refer throughout this opinion to the respondent in the state court proceeding as the state of California, or "the state." The actual respondent was the Secretary of State, March Fong Eu, whose duty it is to implement the principal provisions of the initiative. The respondent was represented by the state Attorney General, Daniel E. Lundgren [sic].

the California Supreme Court upheld, against petitioners' state and federal constitutional challenges, the term limits provisions of Proposition 140. Rejecting any need to adopt a narrow construction to avoid unnecessarily deciding difficult constitutional questions, it further concluded that "the measure contemplated a lifetime ban." *Id.* at 505.

The court first expressed its agreement with one of the arguments advanced by the state and specifically found that *"the language of Proposition 140 is ambiguous as to its intent to impose a lifetime ban." Id.* at 504 (emphasis added). However, after examining the other official material presented to the voters in the ballot pamphlet, it concluded that Proposition 140's framers and supporters had contemplated such a ban. *Id.* In doing so, it implicitly acknowledged the fact that the drafters and supporters not only failed to mention a lifetime ban in the text of the initiative itself, but also failed to do so in their official ballot arguments, both direct and in rebuttal. Ignoring these compelling circumstances, the state court, after specifically conceding that a ballot measure's opponents are likely to overstate the effects of a measure and that their ballot arguments are not "highly authoritative" as to the measure's actual meaning, resolved the crucial ambiguity in the ballot measure in reliance principally on the ballot arguments advanced by Proposition 140's *opponents.*[7] The California Supreme Court, in terms that can

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[7] The court also relied secondarily on the fact that, in his analysis, the Legislative Analyst described Proposition 140 as limiting " 'the number of terms that an elected state official can serve in the same office.' " *Id.* at 505 (emphasis and citation

only be described as hesitant, then said that "[w]e think it likely the average voter . . . would conclude [that Proposition 140] contemplated a lifetime ban. . . . " *Id.*

The California Supreme Court, after setting forth its rule that requires all doubts regarding an initiative measure to be resolved in favor of constitutionality, *id.* at 501, balanced the state interests in support of lifetime term limits against the burden on the constitutional rights of voters and candidates and ruled in favor of the state. The Supreme Court denied certiorari. *Californians for a Citizen Gov't v. Legislature of the State of Cal.*, 503 U.S. 919 (1992) (mem.).

In 1995, plaintiff Tom Bates and a number of his constituents filed suit in district court seeking declaratory and injunctive relief against enforcement of Proposition 140's term limits provisions. Bates represented the 14th Assembly District continuously from his initial election in 1977 until 1996. As a result of Proposition 140, Bates became ineligible to run for re-election in November of 1996, and is forever barred from seeking any other seat in the Assembly as well. Plaintiffs Browning, Buchalter, Graham, Lewis, Lyman, Sherman, and Sterling are voters in Bates' former district. The district court found that they would have voted for Bates in 1996 had he been a candidate. *Bates v. Jones*, 958 F.Supp. 1446, 1456 (N.D.Cal.

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omitted). Although this statement used the term "elected state official" instead of "person" and omitted any mention of a "lifetime" or "permanent" ban, and thus contained the same ambiguity as the Proposition itself, the court deemed it relevant that the Legislative Analyst "made [no suggestion] that only a consecutive term limitation was contemplated." *Id.*

1997). These voters found Bates to be "an exceptional representative, who served his constituents well and was unusually concerned with and effective at representing the needs of low-income and disabled citizens and protecting the environment." *Id.* In the view of these voter-plaintiffs, other candidates are unlikely to represent them as effectively or as well as Bates.

The state argued that Bates' action is barred by collateral estoppel. In two rulings, one published, *Bates v. Jones*, 904 F. Supp. 1080 (N.D.Cal. 1995) (*"Bates I"*), and one unpublished, the district court stated that Bates and the *Eu* petitioners shared the same interests but concluded as a matter of state law that neither Bates nor the voter-plaintiffs had been in privity with the *Eu* petitioners and therefore were not barred from bringing their action. *Id.* at 1088-91.[8]

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[8] The district court also granted Bates leave to amend his complaint to add as plaintiffs Assembly members Martha Escutia and Barbara Friedman, as well as voters from their respective districts. The voter-plaintiffs, Hernandez, Navar, Pena, Sculley, and Zarakov, voted for Escutia and Friedman in the past and wish to be able to do so in the future. Neither Escutia nor Friedman was a member of the Assembly, however, at the time of the *Eu* litigation. Escutia was first elected in 1992, and Friedman joined the Assembly following a special election in mid-1991.

The state argues that the district court abused its discretion in granting the original plaintiffs leave to join these additional plaintiffs. We disagree. Federal Rule of Civil Procedure 15(a) directs a court freely to grant a party leave to amend its complaint "when justice so requires" and "should be applied with 'extreme liberality.' " *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (internal citation and quotation marks omitted). Delay alone is insufficient to justify denial of

The case proceeded to trial in October of 1996. Together, the parties presented evidence on an array of

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leave to amend; the party opposing amendment must also show that the amendment sought is futile, in bad faith or will cause undue prejudice to the opposing party. *Id.* at 186-87; *Webb*, 655 F.2d at 980. First, based upon the evidence, the district court found that neither Bates nor his fellow plaintiffs had acted in bad faith. This finding is not clearly erroneous. *See Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987). Plaintiffs did not attempt to prolong meritless litigation by making repeated and baseless amendments to their complaint; nor is there any evidence of wrongful motive. To the contrary, the district court found that Bates moved to join the additional plaintiffs promptly after discovering his unwitting financial contribution to the *Eu* litigation. The motion to amend was not untimely, repetitious, or for the purpose of keeping meritless claims in court, but to ensure that the claims already presented would be decided on their merits, in furtherance of the very purpose of Rule 15. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Breier v. Northern Cal. Bowling Proprietors' Ass'n*, 316 F.2d 787, 789 (9th Cir. 1963). Second, we reject the state's argument that the district court should have denied the motion to amend because Escutia and Friedman lacked standing. There can no longer be any question as to whether Escutia and Friedman have standing. Escutia was re-elected to a third term, and the district court properly allowed Friedman to remedy the defect in her pleadings by alleging a specific intent to return to the Assembly. Even viewing the question of standing through the eyes of the district court at the time it granted leave to amend, however, Escutia and Friedman did not lack standing. The district court correctly concluded that Escutia and Friedman demonstrated an adequate likelihood of future injury for justiciability purposes merely by alleging their desire to run in a particular election for a fourth term in the Assembly. *See Thorsted v. Munro*, 75 F.3d 454, 456 (9th Cir. 1996) (holding that congressman's challenges to federal term limits were not rendered moot by his defeat in an intervening election, in light of his desire to seek re-election in the future).

issues, including the history of term limits in the United States, the actual strength of the interests asserted by the state, the effectiveness of lifetime term limits as a means of furthering those interests, and the availability of less drastic alternatives.

In its final decision, *Bates v. Jones*, 958 F. Supp. 1446 (N.D.Cal. 1997), the district court concluded in a careful and thoughtfully reasoned opinion that Proposition 140's lifetime term limits for state legislators were unconstitutional, and granted declaratory and injunctive relief against their enforcement. *Id.* at 1471. The district court applied the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), for determining the constitutionality of state laws that regulate the election process and burden the rights of voters and candidates.

The district court stayed its injunction pending appeal. The state and intervenors timely appeal the district court's decision on the merits, and plaintiffs timely appeal the stay of injunctive relief pending appeal.[9]

DISCUSSION

I. Res Judicata

We first consider the state's procedural challenge to plaintiffs' right to pursue this action. The state contends that the res judicata effect of the California Supreme Court's decision in *Legislature v. Eu* bars Bates' claims, if

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[9] We dispose of the appeal from the stay by separate order.

not those of his former constituents as well. We reject the state's argument.

We apply state law in determining the preclusive effect of a prior state court adjudication, 28 U.S.C. § 1738, and we review questions of res judicata and collateral estoppel *de novo*. *In re Russell*, 76 F.3d 242, 244 (9th Cir. 1996). Under California law, collateral estoppel bars parties from relitigating issues of fact or law that have already been fully and fairly litigated in prior proceedings. *Lumpkin v. Jordan*, 57 Cal. Rptr. 2d 303, 307 (Cal. App. 1 Dist. 1996). A party asserting collateral estoppel must demonstrate that the factual or legal issue is identical to the issue that was previously litigated; that the issue was actually litigated in a prior proceeding and there was a final judgment on the merits; and that the party to be estopped in the current action was in privity with a party in the former proceeding. *Lucido v. Superior Ct.*, 51 Cal.3d 335, 341, 795 P.2d 1223 (1990); *Lumpkin*, 57 Cal. Rptr. 2d at 307. Here, the district court found that the first two requirements had been met, but concluded that the state had failed to demonstrate privity between Bates and the *Eu* petitioners. We will assume, *arguendo*, that the district court's finding regarding the first two requirements is correct because we agree with its decision as to the third.

Although "privity" is not a clearly defined concept under California law, it generally refers to persons who are so identified in interest with the parties to the original action that it is proper to bind them along with the parties to the original litigation. *Dyson v. California State Personnel Bd.*, 262 Cal. Rptr. 112, 119 (Cal. App. 3 Dist. 1989). California courts look to whether the relationship

between the party in the earlier suit and the nonparty bringing the current suit is "sufficiently close" to justify preclusion of the latter. *Id.; People v. Drinkhouse,* 84 Cal. Rptr. 773, 776 (Cal. App. 1 Dist. 1970). Due process requires at a minimum that the party to be estopped "must have had an identity or community of interest with, and adequate representation by, the losing party in the first action," and "should reasonably have expected to be bound by the prior adjudication." *White Motor Corp. v. Teresinski,* 263 Cal. Rptr. 26, 29 (Cal. App. 2 Dist. 1989).

With respect to the first inquiry – whether the nonparty had an identity of interest with, and adequate representation by, the losing party in the first action – due process requires both that the prior litigation of the issue have been motivated by the same underlying purposes, and that the original party have had an incentive and opportunity to litigate the issue in the manner best suited to furthering those common underlying purposes. *See, e.g., Clemmer v. Hartford Ins. Co.,* 151 Cal. Rptr. 285, 290 (1978) (finding no privity where issue of "wilfullness" of homicide was litigated first as criminal defense and later to recover defendant's liability insurance). With respect to the second inquiry – whether the nonparty should reasonably have expected to be bound – this notice requirement is satisfied if: (1) the nonparty had received actual notice at the time of the litigation that his interests were being litigated, *see Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.,* 174 Cal. Rptr. 527 (1981); (2) the nonparty "had in reality contested the prior action even if he did not make a formal appearance," such as where the nonparty had a financial interest in and "power to control" the litigation of the prior action, *Lynch*

v. Glass, 44 Cal. App.3d 943, 949 (Cal. App. 1 Dist. 1975); or (3) the unsuccessful party in the first action could "fairly be treated as acting in a representative capacity" for the nonparty now being precluded. *Id.*

The district court concluded that of Bates' constituents, plaintiffs Sterling, Sherman, Graham, and Browning had no identity of interest with the *Eu* petitioners. Sterling and Sherman were not California residents at the time of the *Eu* litigation, while Graham and Browning were not yet old enough to vote. *Bates I*, 904 F. Supp. at 1090. As to plaintiffs Lyman, Lewis, and Bates himself, it found "no indication" that they were "on notice that their First Amendment rights would be foreclosed" by *Eu*, given that *Eu* was not a class action and neither Bates nor any voters from his district participated. *Id.* The district court also concluded that the *Eu* petitioners had not adequately represented the interests of the plaintiffs in this case. It reasoned that the legislature lacked statutory authority to sue on their behalf and had been "representing its own institutional interests rather than the interests of its members or constituents." *Id.* It also noted that plaintiffs had enjoyed "no control" over the *Eu* petitioners' unsuccessful litigation strategies, including their "tactical" decisions to bring their action "directly to the California Supreme Court on a petition for mandate, rather than pursuing the more usual course of litigation beginning with fact-based proceedings in a trial court," and to argue for the broadest possible interpretation of Proposition 140 – the interpretation that would most drastically limit the constitutional rights of Bates and his constituents. *Id.* Finally, it observed that the plaintiffs in this case had neither requested that the legislature bring

the prior action nor participated in it, such as by providing litigation materials or testifying. *Id.* The subsequent discovery that Bates' campaign committee had contributed $1,000 toward the costs of the *Eu* litigation, albeit without his knowledge, did not alter the district court's privity analysis. The district court reasoned that Bates' contribution of "approximately 0.2%" of the funds that supported the *Eu* litigation neither gave him "any control of the litigation" nor caused his interests to coincide with those of the *Eu* petitioners. *Id.* at 219. It also observed that there would be no "prudential reasons" to apply res judicata against Bates if the complaint were amended to add as plaintiffs Escutia and Friedman, who were not members of the legislature at the time of the *Eu* litigation and hence would not be subject to the same res judicata arguments.

We agree with the district court's holding in general and particularly with its conclusion that the *Eu* petitioners did not adequately represent the interests of Bates and his former constituents. Whatever their reasons, the *Eu* petitioners urged the court to construe the initiative in the manner that would most severely limit plaintiffs' fundamental rights. That the present plaintiffs and the *Eu* petitioners are represented by the same law firm is irrelevant; it cannot be inferred that different clients share the same interests or would choose the same strategies simply because they are represented by the same attorneys. The fact that Bates' campaign committee contributed a minute fraction of the costs of the *Eu* litigation fails to establish privity. The state does not even dispute the district court's factual findings that the contribution was unwitting, and that no plaintiff in the present case

enjoyed control over any aspect of the *Eu* litigation as a result of the contribution or for any other reason.[10]

We hold, in the alternative, that even assuming that Bates and his constituents were in privity with the *Eu* petitioners, the district court's res judicata ruling is correct. Under California law, even when the formal prerequisites for collateral estoppel are present, the public interest may require that relitigation of certain questions of law not be foreclosed. It is the "established rule" in California that a "prior legal determination is not conclusive . . . *if the public interest requires that relitigation not be foreclosed.*" *Kopp v. Fair Political Practices Comm'n*, 905 P.2d 1248, 1257 n.16 (Cal. 1995) (emphasis in original). The initial determination of an issue need not be erroneous to warrant reexamination under the "public interest" exception to res judicata. *Id.* Instead, reexamination of a previously decided legal question is appropriate where the potential adverse impact on the public or persons who were not parties to the previous action "demonstrates a convincing need for a new determination of the issue." *Rutherford v. State*, 233 Cal. Rptr. 781, 789 (Cal. App. 4 Dist. 1987) (applying the public interest exception to reexamine the constitutionality of a state environmental

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[10] *Compare, e.g., Montana v. United States*, 440 U.S. 147, 154 (1979) (though not formally a party to prior state court litigation, government was estopped from relitigating in federal court where it required the lawsuit to be filed; reviewed and approved the complaint; paid the attorneys' fees and costs; directed a state court appeal; appeared and submitted an amicus brief in the state supreme court; directed the filing of a notice of appeal to the Supreme Court; and directed the plaintiff to abandon that appeal).

statute and the manner of its enforcement); *Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 825 P.2d 438, 440-42 (Cal. 1992) (applying the public interest exception to permit reexamination of the constitutionality of a statute affecting "the public in general"); *City of Sacramento v. State*, 785 P.2d 522, 528-29 (Cal. 1990) (applying the public interest exception where large numbers of citizens might otherwise be adversely affected by unjust tax impositions); *California Optometric Ass'n v. Lackner*, 131 Cal. Rptr. 744, 747 (1976) (invoking the public interest exception to review an administrative agency's violation of its ongoing obligation to administer statutes enacted for the public benefit).

This case is highly appropriate for application of the public interest exception. As we explain below, Proposition 140 imposes a severe burden on fundamental constitutional rights of voting and association that are "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Moreover, the most serious effects of Proposition 140 are suffered by voters, who, with only a few exceptions, did not participate in, or even have notice of, the action in *Eu*. Finally, since the California Supreme Court's decision, the Supreme Court has decided two cases clarifying issues about which the California Supreme Court expressed uncertainty and indicating that the state's lifetime ban must be more carefully scrutinized as a matter of federal law than some, including the California Supreme Court, had previously believed necessary.[11] *Cf. Minnis v. United*

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[11] *See* discussion of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) and *Burdick v. Takushi*, 504 U.S. 428 (1992), *infra* at 22-23.

States Dep't of Agriculture, 737 F.2d 784, 786 n.1 (9th Cir. 1984) (noting that presence of intervening Supreme Court decisions that clarify issue defeats collateral estoppel claim), *cert. denied*, 471 U.S. 1053 (1985).

We conclude that application of the public interest exception is warranted by the overwhelming public importance of the issues involved; the numbers of persons whose fundamental rights were severely limited as a result of a writ proceeding that was conducted primarily between governmental entities and that bypassed the ordinary judicial procedures; and the existence of intervening, clarifying authority. In concluding that the public interest exception permits a federal court to reexamine federal questions previously decided in state court, we do not, of course, fashion a new doctrine in tension with principles of comity and federalism. Rather, we apply the law of California as fashioned by the California Supreme Court.[12]

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[12] The state also contends that the voter-plaintiffs from Bates' former district lack standing because they have alleged no injury that would be redressed by a decision invalidating the term limit provisions of Proposition 140. It suggests that because Bates is barred from running not by Proposition 140, but by the res judicata effect of *Eu*, a judicial ruling in favor of the voter-plaintiffs would not redress their injury. The argument is utterly without merit. Bates is not in fact barred by res judicata, and even if he were, it cannot be questioned that invalidation of Proposition 140's term limit provisions would enable him to run again and thereby redress the injury alleged by the voter-plaintiffs. It is Proposition 140, not the California Supreme Court's interpretation and application of Proposition 140 in *Eu*, that prevents Bates from seeking re-election.

II. Proposition 140 and the Burden it Imposes

Proposition 140 presents a novel and difficult question of constitutional law. Neither the Supreme Court,[13]

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[13] The state contends that the constitutionality of Proposition 140 is controlled by *Moore v. McCartney*, 425 U.S. 946 (1976) (mem.), in which the Supreme Court summarily dismissed an appeal from *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607 (1976), rejecting an incumbent-governor's federal constitutional challenge to lifetime term limits for state executive officials for want of a substantial federal question. A summary dismissal by the Supreme Court for want of a substantial federal question is a decision on the merits, but is controlling only on "the precise issues presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *see also Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Mandel*, 432 U.S. at 180 (Brennan, J., concurring). As a threshold matter, even if we were to assume that *Moore* concerned precisely the same issues involved here, extensive intervening doctrinal developments – including *Burdick v. Takushi*, 504 U.S. 428 (1992), *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), and *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) – strongly suggest that continued reliance on *Moore* is unwarranted. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (reliance on the fact that the Supreme Court has branded a particular question unsubstantial ceases to be appropriate "when doctrinal developments indicate otherwise"). More important, it is unclear whether the Supreme Court had jurisdiction in *Moore* to consider the rights of *voters*, as opposed to those of candidates. No voters were parties either to the state court action or to the subsequent federal appeal. *Maloney*, 223 S.E.2d at 610-13. There is also, of course, the question whether executive and legislative term limits present the identical issue. Finally, *Moore* is not controlling here because the plaintiff in *Moore*, unlike plaintiffs in the present case, did not raise any First Amendment challenge to term limits. The West Virginia Supreme Court considered only the argument that lifetime term limits for state executive officials violate equal protection. *Maloney*, 223 S.E.2d at 610-13.

nor any circuit court,[14] has ever considered the constitutionality of *lifetime* term limits for state legislators

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[14] The only circuit court decision that even considers the general subject of state term limits, *League of Women Voters v. Diamond*, 82 F.3d 547 (1st Cir. 1996), involves the constitutionality of *consecutive* term limits, and does not address the merits of the issue owing to the procedural posture of the case on appeal. The district court had denied relief on the ground that the statute was "likely" to survive constitutional scrutiny, but had done so expressly "[w]ithout determining th[e] issue finally on its merits." *League of Women Voters v. Diamond*, 923 F. Supp. 266, 272 (D.Me. 1996). In a one-page, *per curiam* opinion, the First Circuit affirmed "substantially for the reasons recited by the district court," agreeing both that the plaintiffs had "established something less than a probability of success on the merits" and that the equities favored denial of preliminary injunctive relief as well. *Diamond*, 82 F.3d at 547.

The state and the Schabarum intervenors nevertheless cite a number of state and federal district court decisions for the proposition that the constitutionality of term limits for state officials is well established. The decisions establish no such proposition. Some of these decisions concerned executive or judicial officials, rather than legislators, while others addressed only the constitutionality of consecutive term limits. *See Dutmer v. City of San Antonio*, 937 F. Supp. 587, 591-95 (W.D.Tex. 1996) (upholding lifetime term limits for city officials); *Nevada Judges Ass'n v. Lau*, 910 P.2d 898, 901-03 (Nev. 1996) (upholding lifetime term limits for judges); *Roth v. Cuevas*, 603 N.Y.S.2d 962 (Sup.Ct.) (upholding consecutive term limits for city officials), *aff'd*, 603 N.Y.S.2d 736 (App. Div.), *aff'd*, 624 N.E.2d 689 (N.Y. 1993); *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607, 611-13 (W.Va. 1976) (upholding lifetime gubernatorial term limits), discussed *infra*. In fact, only one state supreme court decision has upheld lifetime term limits for legislators. *See U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 359-60 (Ark. 1994) (upholding lifetime term limits for legislative and executive officials), *aff'd in other respects sub nom. U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) Most recently, the Supreme Judicial Court of

or, indeed, any state officials. A lifetime ban is, for two primary reasons, different in kind from all other state laws affecting the election process that the Supreme Court and circuit courts have previously considered in a First Amendment context.

First, Proposition 140 affects a change in the state's governmental structure that is far more basic than any provision dealt with in prior cases examining state election laws for First Amendment violations. The state interest underpinning lifetime term limits is not merely the customary one of regulating elections, but, rather, it lies in the state's power to determine the fundamental nature of its legislature.[15] Here, it does this by attempting to

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Massachusetts struck down a law imposing consecutive term limits on state executive and legislative officials, but did so on state law grounds. *League of Women Voters v. Secretary of the Commonwealth*, 681 N.E.2d 842 (Mass. 1997).

[15] The Supreme Court has dealt with cases involving similar state interests in the equal protection context. The state's interest in designing its own legislative structure was essentially the interest involved in *Reynolds v. Sims*, 533 U.S. 377 (1964) and *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964). In *Lucas*, the Court invalidated an initiative passed by the citizens of Colorado which apportioned the House of Representatives on the basis of population, but apportioned the Senate according to population *and* other factors, including geographical, historical, topographic, and economic considerations. 377 U.S. at 738. *Reynolds* involved the same basic issue, except the state law there was a decades-old act passed by the state legislature. In deciding the cases, the Court gave little deference to the states' interest in defining its political institutions as it saw fit, concluding that the full and unfettered right to vote in state elections is of the upmost importance. It then invalidated the state laws under the Equal Protection Clause on the ground that one person's vote could not count more than another's.

ensure that future lawmakers will all be "citizen-legislators." In contrast, as the Court said recently in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), the state election laws at issue in prior cases (other than equal protection cases), related to the states' adoption of "election *procedures*," 514 U.S. at 835, and were designed to ensure that elections would be conducted in an "orderly, fair, and honest" manner. *Id.* at 834.[16]

Second, the severity of the burden that Proposition 140 imposes on the people's right to vote for the candidates of their choice far exceeds any limitation imposed by laws that simply regulate the state electoral process.[17]

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[16] The Court cited as examples of such regulatory laws *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding Hawaii statute requiring state legislative candidates to comply with state procedures in order to qualify for ballot and prohibiting write-in voting); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (invalidating Ohio's early filing deadline for independent candidates for President); and *Storer v. Brown*, 415 U.S. 724 (1974) (upholding California's timing and signature requirements for appearing on ballot).

[17] *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) dealt expressly with the people's constitutional right to vote for whomever they wish and analyzed the burden that lifetime term limits imposes on that right. The Court made it clear that it believed the burden to be severe. However, because the term limits in that case applied to federal, as opposed to state, legislators, the Court ultimately based its holding principally on the Qualifications Clause of the U.S. Constitution. *See* 514 U.S. at 787-826.

Justice Kennedy, who joined the Court's opinion in *U.S. Term Limits*, wrote a separate concurrence explaining the differences between the majority and dissenting opinions regarding the Qualifications Clause. He did not, however, express any disagreement with the Court's view that lifetime

In the past, the burdens imposed by state election laws have required candidates for office to comply only with "procedural hurdles" in order to earn a place on the ballot. Thus, as the Court explained in *U.S. Term Limits*, none of its decisions upholding state laws as legitimate exercises of the power to regulate elections addressed a law that limited voting rights by "exclud[ing] candidates from the ballot without reference to the candidates' support in the electoral process." *Id.* at 835.[18] None severely

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term limits impose a severe limitation on the exercise of fundamental rights, nor did he disavow the historical analysis of that question that runs throughout the Court's opinion. Whatever one's view of the outcome of any balancing test that may be used to determine whether the state's interest outweighs the burden inherent in limiting voters' rights, there should be little doubt that precluding all of the voters of the state from again voting for the candidates they have chosen to be their choice as their representatives severely limits their right to vote for whom they choose.

[18] The cases that the Court distinguished include all but one of the cases on which the state principally relies. While the Court did not mention *Gregory* in its decision, the reasons are obvious. First, the plaintiffs in *Gregory* did not assert any voting rights claim. Rather, the plaintiff-judges alleged only an equal protection violation, and no voter was a party to the proceeding. Moreover, there are three key differences between Missouri's law in *Gregory* and the type of law to which the Court was referring. First, the judges did not run against other candidates in the elections; at the end of a fixed term, rather, a question appeared on the ballot as to whether they should be returned to office. *See Gregory*, 501 U.S. at 472 (citing Mo. Const., art. V, § 25(a)). Second, Missouri's age-restriction, like minimum age restrictions, operated to exclude candidates for a very limited time period (the period of life expectancy after the age of 70). Third, electing judges invokes significantly different considerations than that of electing legislators. Legislators are supposed to draw public support by representing the popular

limited the voters' right to vote for the candidate of their choice.

We do not in any way minimize the state's interest in adopting measures like Proposition 140. It cannot be doubted that the state has a particularly strong interest in its right to determine the structure of its political institutions. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *see also Dunn v. Blumstein*, 405 U.S. 330, 344 (1972) (stating that a state enjoys inherent authority to define itself by "preserv[ing] the basic conception of a political community"); *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973). Indeed, the manner in which a state designs its own political structure and sets qualifications for its officials "lie[ ] at the heart of representative government." *Gregory*, 501 U.S. at 463 (internal quotation marks and citation omitted).[19]

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will and passing laws in the people's interest; thus, under the democratic process, legislative elections, unlike unopposed judicial elections, are a crucial method of ensuring that public officials implement the people's desired state policies. *See id.; cf. Reynolds*, 377 U.S. at 562 (highlighting the paramount importance to our democracy of state legislatures). *Gregory* differs from the case before us in these same respects.

[19] States, however, are not free to create their legislative structures in violation of constitutional restraints. *See Reynolds*, 577 U.S. at 566; *accord Lucas*, 377 U.S. at 736. As the Court very recently emphasized, "[s]tates . . . enjoy wide latitude to establish conditions of candidacy for state office, but in setting such conditions, they may not disregard basic constitutional protections." *Chandler v. Miller*, 117 S. Ct. 1295, 1302 (1997) (citing *Gregory*, 501 U.S. at 463).

Footnote continued on following page.

On the other hand, the Supreme Court has left no doubt that the burden created by the state's lifetime ban is exceptionally severe. While we have no need in this opinion to balance the state's interest in adopting lifetime term limits against the burden they impose on fundamental voting rights, determining the extent of this burden is important to our analysis.

The Supreme Court has emphatically stated that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 555. Because "[s]tate legislatures are, historically, the fountainhead of representative government in this country," this right applies with equal force "in state as well as federal elections." *Id.* at 554, 564. "Other rights," the Supreme Court has explained, "even the most basic, are illusory if the right to vote is undermined." *Williams*, 393 U.S. at 31 (quoting

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Nor, contrary to the state's suggestion – which the dissent apparently adopts at least to some degree – may states insulate from judicial review their decisions regarding their political structures by claiming that they present nonjusticiable "political questions." The Supreme Court has, for decades, soundly rejected this argument. *See, e.g., Baker v. Carr*, 369 U.S. 186, 209-37 (1962). It is abundantly clear since that historic decision that constitutional claims are not rendered nonjusticiable merely "because they touch matters of state governmental organization." *Id.* at 229. *Clements v. Fashing*, 457 U.S. 957, upon which the dissent relies, merely states the obvious under that rule: that courts should not disturb "the manner in which a State has decided to govern itself" *if that manner does not violate the First or Fourteenth Amendment. Id.* at 972.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964)). Hence, Proposition 140's lifetime ban on the people's right to vote for legislators of their choice does not simply handicap the rights of individuals; it violates a "fundamental principle of our representative democracy" that "the people should choose whom they please to govern them." *U.S. Term Limits*, 514 U.S. at 795 (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting 2 Debates on the Adoption of the Federal Constitution 257 (J. Elliott ed. 1863) (Alexander Hamilton, New York))) (internal quotation marks omitted).

> As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. . . . "The people are the best judges who ought to represent them. To dictate and control them, to tell them who they shall not elect, is to abridge their natural rights."

Powell, 395 U.S. at 547; *id.* at 541 n.76 (quoting 2 Elliot's Debates 292-93). In *Powell*, the Supreme Court "agreed with the sentiment expressed on behalf of Wilkes' admission to Parliament: 'That the right of electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution.' " *U.S. Term Limits*, 514 U.S. at 795 (quoting *Powell*, 395 U.S. at 534 n.65 (quoting 16 Parl. Hist. Eng. 589-90 (1769))).

Lifetime term limits impose a penalty on the voters that is both severe and paradoxical. Unlike consecutive term limits, which are designed to obviate any unfair advantages incumbents may have, lifetime term limits do

not simply provide a hiatus from office, but, rather, impose a permanent ban. The effect of lifetime term limits, as Justice Kennedy explained in his concurring opinion in *U.S. Term Limits*, is "that [a state] can burden the rights of resident voters in federal elections by reason of the manner in which they earlier had exercised [those rights]. If a majority of the voters . . . successful[ly] select[s] a candidate, they [are] penalized from exercising that same right in the future." 514 U.S. at 844 (Kennedy, J., concurring). The logic of this statement is, of course, equally applicable to state elections; the penalty imposed on the voters is identical.

Despite the strength of the Supreme Court's statements, the state contends that term limits do not impose a severe burden on individual rights, in part because they neither "discriminate" against a particular political group or viewpoint nor constitute a "content-based restriction." In addition, the state emphasizes that voters may still vote for candidates with "similar views and ability" to those incumbents barred by term limits and that individuals barred from the legislature by term limits remain eligible to hold state executive office, elective or appointed, or to seek federal office. The burden Proposition 140 imposes on the rights of voters and candidates is truly severe for the reasons already explained. We need not consider whether in addition the measure can be described as "discriminatory" or "content-based." That there may be other candidates whose views the voters may find palatable, and that "termed out" candidates are free to seek non-legislative offices simply does not address the constitutional injury inflicted: the Proposition permanently deprives the voters of the right to vote for

the *person* they wish to represent them in the *state legislature*.[20]

The state offers two additional arguments in mitigation of the burden imposed by lifetime term limits – namely, that the burden is lessened by the possibility of future repeal, and that term limits reduce existing burdens on voting rights. These arguments are without merit. First, the ability of a majority of voters to repeal term limits in no way mitigates the burden that the measure imposes while it is in effect. Were laws to be held not to limit fundamental rights because they can be repealed, the Constitution would become a meaningless document. Every law, no matter how violative of individual rights, would pass the state's test. That the law was passed by initiative makes it even harder to rid society of the measure because of the extreme financial costs involved in putting initiatives on the ballot. *See infra* note 29. Second, the state's argument that term limits *reduce* existing burdens on voting rights by enlarging the field of eligible candidates is pure speculation. More important, the assertion that Proposition 140 constitutes an effort to enhance a fundamental right by infringing on it is a

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[20] Contrary to the suggestion of the Schabarum intervenors, the ability of states to disenfranchise convicted felons does not demonstrate that permanent restrictions on the franchise are reasonable. The Court has held that the permanent disenfranchisement of convicted felons does not violate equal protection for the specific reason that it has "an affirmative sanction in § 2 of the Fourteenth Amendment" demonstrated by both the text and history of that provision. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). The Schabarum intervenors do not suggest, and we see no basis for concluding, that term limits enjoy similar support in the text and history of the Constitution.

woefully misguided argument that the Court has emphatically rejected in the past. *See Buckley*, 424 U.S. at 48-50 (stressing that "the concept that government may restrict the speech of some . . . to enhance the relative voice of others is wholly foreign to the First Amendment").

III. Proposition 140's Enactment and Its Lack of Notice

In this case of first impression, we are faced with directly conflicting rights and interests of the upmost importance. The state has attempted to resolve this historic conflict by means of a direct ballot initiative that would severely limit the right of the people to elect whomever they choose. Whether or not a state may lawfully adopt lifetime legislative term limits as a general matter, the techniques it has employed here raises a serious issue of constitutional dimension: whether the voters are entitled to adequate notice that the measure, if enacted, would severely limit their fundamental rights. Proposition 140 on its face contained no reference to *lifetime* limits, and the ballot arguments submitted by the initiative's proponents failed to mention that the measure contemplated such a ban; so, too, the materials prepared by the state were wholly silent on the point. The initiative barely passed with an affirmative vote of 52%; a switch of approximately 2% of the votes would have resulted in its defeat.

We are faced, in short, with two constitutional issues in this case: one procedural, one substantive. Given the magnitude of the substantive constitutional question presented by lifetime legislative term limits and the narrowness of the procedural question regarding the need for

fair notice in this type of initiative measure, it seems prudent – as well as logical – to decide the procedural question first. Such an approach is consistent with Justice Powell's admonition in *Communist Party of Ind. v. Whitcomb*, 414 U.S. 452 (1974), that "the appropriate exercise of judicial power requires that important constitutional issues not be decided unnecessarily where narrower grounds exist for according relief." *Id.* at 663 (Powell, J., concurring) (opting, joined by three other Justices, to rest concurring vote on narrow equal protection ground instead of broad First Amendment freedom-of-speech ground); *see also Thompson v. Oklahoma*, 487 U.S. 815, 858 (1988) (O'Connor, J. concurring) (reiterating long-standing doctrine that federal courts "avoid unnecessary, or unnecessarily broad, constitutional adjudication"); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 297 (White, J., concurring in part and dissenting in part) (espousing adherence to principle that, when presented with two separate constitutional questions, Court decide narrow constitutional question). That approach, as Justice O'Connor stated, finds its genesis in Justice Brandeis' concurrence in *Ashwander v. TVA*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring). Its basic teaching, which we follow today, is the need to abstain from deciding fundamental constitutional questions prematurely, and perhaps unnecessarily.

A careful analysis of Proposition 140 and the California Supreme Court decision construing it reveals that the Proposition and the relevant ballot materials failed adequately to advise the voters of its principal and most drastic effect. The people were required to vote on an initiative measure without adequate notice of the severity

of the burden it imposed on their fundamental voting rights – a measure that did not clearly inform them that they were being asked to adopt a *lifetime* ban on future legislative service by the persons they choose to be their representatives. Moreover, it is likely that the number of voters who were not aware of the initiative's principal effect was sufficiently large that it could have affected the outcome of the election. We conclude that under these circumstances, even if a majority of the voters of the state of California may, under other circumstances, lawfully decide to adopt lifetime legislative term limits, the passage of Proposition 140 did not constitutionally achieve that objective.

The California Supreme Court expressly determined that "the language of Proposition 140 is ambiguous as to its intent to impose a lifetime ban." *Legislature of the State of California v. Eu*, 816 P.2d 1309, 1315 (Cal. 1991), *cert. denied sub nom. Californians for a Citizen Gov't v. Legislature of the State of Cal.*, 503 U.S. 919 (1992). In this respect, it accepted the argument advanced by the Attorney General of California on behalf of the Secretary of State. We agree and consider the California court's conclusion authoritative. *See, e.g., Johnson v. Fankell*, 117 S. Ct. 1800, 1804 (1997) (state supreme court constructions of state laws are binding on federal courts); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1494 n.4 (9th Cir. 1996) (requiring deference to state supreme court constructions of state laws). The preamble of Proposition 140 focuses almost exclusively on curbing unfair "incumbent" advantages, an objective that underlies the imposition of both consecutive and lifetime term limits. The Proposition goes on to

state that "[n]o Senator" and "[n]o member of the Assembly" may serve more than two or three terms respectively. Cal. Const., art. IV, § 2, subd. (a).[21] The state Attorney General contended that this language applies only to senators and members of the assembly and not to former officeholders. Read in this manner, the measure would impose *consecutive* term limits, not a lifetime ban. The phrase "lifetime limits," which the state uses so forcefully now, appears nowhere in the text of the amendment, the proponents' ballot arguments, or the official statements prepared by the state. As the California Supreme Court recognized, therefore, the Proposition could easily be read as applying only to incumbent office holders. *Eu*, 816 P.2d at 1314-15. Nonetheless, the court, after conceding that opponents tend to overstate the effects of measures in their ballot arguments, relied primarily on the *opponents'* ballot arguments in reaching the equivocal conclusion that, despite the initiative's facial ambiguity, "We *think* it *likely* [that] the *average* voter . . . would conclude the measure contemplated a lifetime ban." *Eu*, 816 P.2d at 1316 (emphasis added). As we read the court's opinion, that is by no means a finding (or a conclusion) that *all* of the voters who voted in favor of the measure so understood it, or even that a sufficient number of those

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[21] This language stands in contrast not only to other states' lifetime bans, *see supra* note 4, but also to the lifetime-presidential-term-limits provision of the U.S. Constitution. *See* U.S. Const., amend. XXII ("No *person* shall be elected to the office of the President more than twice. . . . ") (emphasis added). Proposition 140's drafters, therefore, easily could have presented to the voters an unambiguous lifetime-ban provision by simply tracking the language of the U.S. Constitution.

voting "yes" to constitute a majority did so. Given the 52% affirmative vote, the court's statement falls far short of supporting any such inference. In fact, it appears to us to acknowledge implicitly that a number of voters who do not fall within the classification "average"[22] are likely to have suffered the inevitable consequence of a lack of adequate notice – i.e., that a fair number may (because of the lack of such notice) have failed to understand that a lifetime ban was contemplated.[23]

Although the proper interpretation of Proposition 140 is purely a matter of state law, the issue whether the people's fundamental political rights may be severely burdened by means of an "ambiguous" initiative that "the average voter" would only "likely" understand is, contrary to the state's assertion in its supplemental brief, a question of federal law. Under the California rule for construing initiatives, which requires courts to indulge "all presumptions [in] favor [of] the validity of initiative measures," *id.* at 501, it is enough for purposes of interpreting the meaning of the measure that the "average"

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[22] California is no Lake Wobegon where all people are "above average," *see* Garrison Keillor, Lake Wobegon Days (1985); nor, obviously, are 96% of the voters who cast ballots on the measure, pro or con, "average," or above. (Ninety-six percent of the "yes" voters is the number of voters necessary to constitute a majority of those voting.)

[23] We emphasize that the closeness of the vote is not necessary to our decision. Nevertheless, we note that the state now contends that "[n]o voter could have missed the point." Supp. Br. at 2. In doing so, the state flatly contradicts its statements to the state supreme court regarding the measure's ambiguity. Ambiguity, in itself, shows that some voters, at least, are likely to have "missed the point."

voter "likely" understood the measure. But the federal standard for adequate notice when fundamental rights are at stake requires a different and more stringent inquiry. Thus, while we accept the California Supreme Court's determination that the measure contains a lifetime ban, how and in what manner a state may limit rights guaranteed by the Constitution is a quintessential federal law issue. Here, that issue directly implicates due process concerns.

It is well established that when a restriction "severely" limits fundamental voting rights, courts must assess the state's interests in doing so with great care. *See Burdick*, 504 U.S. at 434; *Norman v. Reed*, 502 U.S. 279, 289 (1992); *Reynolds*, 533 U.S. at 562. Our exercise, although derived from the principles of *Burdick*, is one step removed. Before even imposing such burdens on fundamental rights, we must be assured that the process permits the imposition.

We believe that *Burdick*, along with the Supreme Court doctrine discussed below, requires that we carefully scrutinize the process by which initiatives, such as Proposition 140 – initiatives that have the effect of severely limiting fundamental voting rights – are enacted. We must do so in order to ensure that sufficient notice has been given that fundamental rights will be so burdened. Simply put, we believe that the careful scrutiny required by *Burdick* must apply to the process as well as the effect of such laws. Indeed, the Supreme Court has, on a number of occasions, refused to permit the imposition of severe limitations on fundamental rights in the absence of adequate notice and a carefully considered decision to do so. Years ago, for instance, the Court

explained that decisions to restrain "long-accepted notions of fair procedures . . . must be made explicitly not only to assure that individuals are not deprived of cherished rights and procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting . . . our laws." *Greene v. McElroy*, 360 U.S. 474, 507 (1959) (internal citations omitted); *see also United States v. Bass*, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas . . . the requirement of clear statement assures that the [enacting body] has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

While this principle has most often been employed in order to construe narrowly statutes of questionable constitutionality,[24] the Court has, on occasion, invoked it to strike down laws when a narrow construction was unavailable. In *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), for example, federal regulations deprived aliens of the right to work in federal service positions. In support of the regulations, the federal government asserted an "overriding" national interest for its discriminatory rule. Recognizing that if it accepted the government's interest it could not reasonably apply any balancing test, the Court *struck down* the regulations because nothing demonstrated that the parties responsible for enacting the

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[24] *See, e.g., Kent v. Dulles*, 357 U.S. 116, 129-30 (1958) (declining, because no clear statement was present, to read statute delegating authority to the Secretary of State as granting the authority to limit people's fundamental right to travel and, therefore, invalidating State Department directive limiting citizens' passport rights).

regulations had given the matter "a considered evaluation." 426 U.S. at 115. Even assuming that the government's overriding interest "would adequately support an explicit determination by Congress or the President to exclude all noncitizens from public service," the Court held that due process required more thorough and definitive action by the entities responsible for enacting the drastic regulation. 426 U.S. at 116.[25]

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[25] Specifically, the Court stated: "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." 426 U.S. at 103. The majority invalidated the regulations despite the dissent's reminder that "the power of the federal courts is severely limited in the areas of immigration and regulation of aliens." *Id.* at 117 (Rehnquist, J., dissenting) (gathering cases). The power of the federal courts, on the other hand, is perhaps at its zenith in the areas of the First and Fourteenth Amendments and voting rights. We therefore believe that the procedural due process requirements identified in *Hampton* apply with particular force to initiatives like Proposition 140.

The Court's *Hampton* decision was very much like two decisions in which the Court had applied due process to direct democracy in the context of restraints on the use of land. *See Washington ex rel. Seattle Title Trust Co. v. Roberege*, 278 U.S. 116 (1928); *Eubank v. City of Richmond*, 226 U.S. 137 (1912). In both cases, the court struck down as violative of due process local ordinances that allowed zoning decisions to be made simply by a two-thirds popular vote of the residents in the area. In both cases, the Court concluded that the authority of the property owners "uncontrolled by any standard or rule prescribed by the legislative action," with no provision for review, violated the people's due process right to a considered decision by an independent body. *Roberge*, 278 U.S. at 121-22; *accord Eubank*, 226 U.S. at 144.

Perhaps the case that is most comparable to the one before us is *Thompson v. Oklahoma*, 487 U.S. 815, 857 (1988). In that case, the Supreme Court faced the question whether states could constitutionally impose the death penalty on children younger than 16. Because Oklahoma law, like the law of 19 other states, sometimes channeled 15-year-olds into the adult criminal justice system, it allowed Thompson to be executed. An Oklahoma jury sentenced Thompson to death, and Oklahoma's Court of Criminal Appeals affirmed both the constitutionality of its law and the sentence. 487 U.S. at 820. Presented with such a powerful interpretation of state law, the plurality and the dissent attempted to discern whether states like Oklahoma actually intended their laws to apply this way and disagreed sharply over whether there was a national consensus forbidding such executions. Justice O'Connor, however, concluded that it was unnecessary to take a position on the issue that divided the Court because of the basic flaw inherent in the Oklahoma law. While not expressly mentioning due process, she nonetheless cast the deciding vote to hold the law unenforceable because "there [was] a considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility." *Id.* at 857 (O'Connor, J., concurring). Because those voting for the law severely burdened the fundamental constitutional right to be free from cruel and unusual punishment "without the earmarks of careful consideration that [the

Court] has required for other decisions" in this fundamental, constitutional area, Justice O'Connor cast the deciding vote not to enforce the Oklahoma law. *Id.*[26]

Justice O'Connor repeatedly emphasized that *Thompson* was a death penalty case, and that death penalty cases are "different." She also stressed that *Thompson* was an "unusual," even "unique," case. *Id.* at 858 (O'Connor, J., concurring).[27] The case before us, however, is equally unusual and, in many ways, as compelling. First, as we have previously emphasized, the right at issue here is also fundamental. The passage of the measure directly affects every voter in California in the most fundamental way; in our representative democracy, the right to elect whomever one chooses is the most central of all rights. *See Reynolds*, 377 U.S. at 562 (explaining that "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights"); *supra* at 25-27. Second, the absence of due process is even more apparent in the California initiative because it was

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[26] It is unclear from the Court's decision whether it struck down Oklahoma's law or whether it somehow merely held it inapplicable. Obviously, however, the result was the same: the Court held that the state could not enforce its law.

[27] Although the holding was "unusual," it certainly did not lack precedent. For another such holding, see *Califano v. Goldfarb*, 430 U.S. 199, 1035 n.9 (Stevens, J., concurring) (casting deciding vote to hold that Social Security Act provision violated equal protection right because there was no clear evidence of a "considered legislative choice," but stating that "[p]erhaps an actual, considered legislative choice would be sufficient to allow this statute to be upheld, but that is a question I would reserve until such a choice has been made").

explicitly found "ambiguous" on its face, not just possibly unintended. The measure is not one that might have required the voters simply to predict certain potential applications or fill in gaps in the initiative; they had to guess as to the very meaning and effect of the measure's principal provision. The ambiguity lies at the heart of the language of the measure, at the heart of the provision that implements its principal objective – a provision that has since been construed as imposing a lifetime ban, a severe limitation on the people's most fundamental right.

Cases involving the adoption of state laws or constitutional amendments by means of the initiative process raise concerns that are not present when ordinary legislative lawmaking is involved. Though the initiative process was virtually unknown to the Framers, the Federalist papers – and, to a lesser extent, the Constitution – reflect a wariness of the products of simple majoritarianism. In Federalist No. 10, Madison stated that majority factions ought to be contained because they are apt to be willing to sacrifice the "public good and the rights of citizens" to their "ruling passion or interest." Federalist No. 10, at 60-61 (James Madison) (J. Cooke ed. 1961). He was even more direct in Federalist No. 51: "If the majority be united by a common interest, the rights of the minority will be insecure." *Id.* No. 51, at 351 (James Madison). Of particular relevance to the case at hand, Madison continued, "There are particular moments in public affairs when the people stimulated by some irregular passion, or some illicit advantage, *or misled by the artful representations of interested men,* may call for measures which they themselves will afterwards be the most ready to lament." *Id.* No. 63, at 425 (James Madison) (emphasis added). It is

government's duty under our constitutional design, therefore, to "safeguard against the tyranny of [such] passions." *Id.* We agree with Hamilton that the need for judicial independence is the greatest when constitutional impairments are "instigated by the major voice of the community." *Id.* No. 78, at 528 (Alexander Hamilton).

Although it has long been settled that, notwithstanding these concerns, states may pass laws by initiative, *see Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912), direct ballot measures lack the kinds of critical, deliberative filters that the Framers contemplated and that, to some extent, the Constitution created as prerequisites to the passing of legislation.[28] Before an initiative becomes law, no committee meetings are held; no legislative analysts study the law; no floor debates occur; no separate representative bodies vote on the bill; no reconciliation conferences are held; no amendments are drafted; no executive official wields a veto power and reviews the law under that authority; and it is far more difficult for the people to "reconvene" to amend or clarify the law if a court interprets it contrary to the voters' intent.[29] The

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[28] *See, e.g.*, Guido Calabresi, A Common Law for the Age of Statutes 70-71 (1982) (describing on paucity of procedural protections in initiative process); Julian Eule, *Judicial Review in a Direct Democracy*, 99 Yale L.J. 1503, 1525 (1990) (contrasting initiative measures with legislation).

[29] The financial cost of passing or defeating ballot measures, and of qualifying them for the ballot in the first place, is inordinately high. *See, e.g., Coalition for Economic Equity v. Wilson*, 946 F.Supp. 1480, 1498-99 (1996) (describing the costs – in the millions of dollars – of introducing and supporting initiatives in California), *vacated on other grounds*, 110 F.3d 1431 (9th Cir. 1997); Bill Stall & Dan Morain, *Prop. 209 Wins, Bars*

public also generally lacks legal or legislative expertise – or even a duty (as legislators have under Article VI) to support the Constitution. It lacks the ability to collect and to study information that is utilized routinely by legislative bodies.[30] Thus, at least in instances like this, in which the measure raises serious constitutional questions, our usual assumption that laws passed represent careful drafting and consideration does not obtain.[31]

Affirmative Action Initiatives, L.A. Times, Nov. 6, 1996, at A1 (stating that $45 million spent by both sides combined on Proposition 211 and that $85 million was spent on campaigns for initiatives in election).

[30] As Hans Linde, a former Justice on the Oregon Supreme Court, once explained:

> Whatever the private goals of the sponsors, once a measure is drafted it is past systematic factfinding, analysis, amendment or compromise. Aside from newspaper editorials or an occasional voters' pamphlet, the debate leading to discussion is left to the electioneering slogans of competing advertising firms. Yet such a measure may repeal, alter, or contradict the most carefully studied and best designed enactment of the legislature.

Hans Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197, 228 (1976).

[31] *Compare, e.g., Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827):

> It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench.

Id. at 270.

Moreover, the search for the people's intent in passing initiatives is far different from the attempt to discern legislative intent; there are no legislative hearing transcripts, committee reports, or other legislative history.[32] *See* Jane S. Schachter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy,* 105 Yale L.J. 107 (1995). Proposition 140 suffers from precisely this problem. There is nothing, other than the facially ambiguous initiative, the official ballot arguments and the state-prepared materials, to look to in order to discern the people's intent in passing the measure. And Proposition 140 simply presents us with no evidence, in its language, in the proponents' ballot argument, or in the state-prepared material that the people had *adequate notice* of the measure's principal objective and most drastic effect: the severe burden, in the form of lifetime term limits, on fundamental voting rights. While the California court relied primarily on the opponents' ballot arguments and secondarily on the Legislative Analyst's report describing the measure, those writings fall far short of what is necessary to meet the due process requirements of fair notice to the voters and a concomitant showing of careful consideration of the burden to be imposed. The Legislative Analyst's report is almost as ambiguous as the initiative itself, and the opponents' arguments are entitled to

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[32] Any materials that advocacy groups circulate describing the initiative are not analogous sources, for they are not produced by the *voters* through a deliberative process. Such materials are, at bottom, only advertisements. Relying on them as indicative of the voters' intent would be tantamount to relying on political parties' campaign advertisements to interpret legislative acts.

little weight even under California law. *See Eu*, 54 Cal.3d at 505 (stating that an initiative's opponents "frequently overstate the adverse effects of challenged measures," and, therefore, that their claims "are not highly authoritative in construing the measure");[33] *cf. DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568, 585 (1988) ("The views of opponents of a bill with respect to its meaning . . . are not persuasive."); *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964) ("In their zeal to defeat a bill, [opponents] understandably tend to overstate its reach. 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.' " (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951)). Thus there is insufficient indication that the voters had adequate notice that the measure would burden so severely the people's fundamental constitutional right to choose their legislative representatives.[34]

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[33] Also *compare San Diego Coast Reg'l Comm'n v. See the Sea, Ltd.*, 9 Cal.3d 888, 891 (1973) (construing initiative as not imposing construction moratorium because the initiative "[n]owhere . . . expressly provide[d] for a moratorium") *with id.* at 897 n.5 (Mosk, J., dissenting) (noting that the opponents' ballot argument "warned that the act would impose a moratorium").

[34] After stating that the California Courts may, under California law, examine material that lies "outside the four corners of the initiative" in order to determine voter intent, the dissent relies extensively on material either not before the California Supreme Court or rejected by it. We are aware, for example, that when the voters adopted Proposition 140 they also rejected Proposition 131, which among other things, provided expressly for state-financed election campaigns as

Furthermore, when fundamental, constitutional rights, such as voting rights, are at stake,[35] basic tenets of procedural due process require states to adopt minimally burdensome safeguards if there is a significant risk of an erroneous deprivation of that right. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (establishing balancing test with respect to those factors). The Supreme Court

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well as consecutive term limits. The California Supreme Court did not mention Proposition 131 in its opinion and the state also does not mention it in its briefs in this case. The state, however, did point out the Proposition in its brief to the California Supreme Court and contended that the court could *not* reasonably conclude that the voters rejected Proposition 131 on the basis that its term limits were not permanent because "Proposition 131 was 14 pages long (Ballot Pamphlet, pp. 101-105) and covered several, complex issues . . . [including] expenditures of public funds, but was vague on the certainty of commensurate revenues." Br. of Secretary of State, *Legislature of the State of Cal. v. Eu*, 54 Cal.3d 492 (1991), at 25 n.13. The proponents then seized on the state's argument and urged an opposite position in its reply brief. We agree with the state's argument and with the California Supreme Court's decision to give no weight to the differences in the term limits language in the two propositions and to decline to speculate as to why the voters adopted one measure and not the other. Although some newspaper articles and the *opponents'* ballot arguments contrasted the measures as "lifetime limits versus consecutive limits," such editorials and arguments hardly rise to the level of something like legislative history.

[35] Fundamental rights of course qualify as "liberty interests," thus triggering the protections of the Fourteenth Amendment's Due Process Clause. *See, e.g., Paul v. Davis*, 424 U.S. 693, 711 n.5 (1976) (noting that rights protected by the Bill of Rights are protected by procedural due process requirements).

stated in *Burdick* that "[c]ommon sense, as well as *constitutional law*, compels the conclusion that [state] government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)) (emphasis added). Thus, the state of California has a constitutional obligation to ensure the fairness of its elections, including those involving the initiative process. California, indeed, has adopted several statutory provisions designed to ensure that voters will be afforded fair notice of the contents of ballot measures. *See, e.g.*, Cal. Elec. Code §§ 9051-52 (investing Attorney General with authority to provide a ballot title for initiative measures and to "give a true and impartial statement of the purpose of the measure"); *id.* § 9085 (requiring Legislative Analyst to provide in the ballot pamphlet a summary of the measure); *id.* § 9087 (requiring Legislative Analyst to "generally set forth in an impartial manner the information the average voter needs to adequately understand the measure").[36] In this

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[36] Voters may enforce all of these mechanisms in state court, but only to a limited extent. *See* Cal. Elec. Code § 9092 (allowing voters to seek a peremptory writ of mandate to require title, summary, or statement to be amended or deleted from ballot pamphlet). The California courts will issue such a writ, however, "only upon clear and convincing proof that the copy in question is false, misleading, or inconsistent with the requirements of [the election code]." *Lundgren* [sic] *v. Superior Court*, 48 Cal. App.4th 435, 439 (1996). When the Attorney General has already provided an "impartial statement" of the initiative, a voter may not compel a writ to require him "fully [to] state[ ] the

case, the state could have ensured with only a minimal effort that adequate notice was afforded the voters of the severe burden imposed by the measure. In fact, it appears that all that was necessary to provide adequate notice to the voters that their fundamental voting rights would be so burdened was compliance with the state's own statutes. At no point in the process, however, did either the Attorney General or the Legislative Analyst include the word "lifetime" or "for life," or even a word such as "permanent," "total," "prohibition," or "ban" in any of the ballot materials that it was their duty to prepare. To the contrary, they perpetuated at every turn the ambiguity created by the measure's proponents. Not only would performing their duties in the manner contemplated by state law have imposed no burden on the state officials, but it would have afforded the voters the notice of the measure's principal effect that due process of law requires.

Similarly, if the proponents of Proposition 140 truly intended to put to the voters the proposal of lifetime term limits, they could have simply put that phrase into the initiative. The phrase is perfectly clear and existed long before the election. This safeguard would have imposed no burden at all on the measure's sponsors, yet would have ensured that voters would have received adequate notice of the initiative's sweeping effect. *Cf. Mathews*, 424 U.S. at 334-35.

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main purpose or chief point of the initiative." *See id.* at 441, 443 (vacating lower court order requiring such action).

Counsel for the state, Professor Elhauge, conceded at oral argument that the voters must be clearly informed of the initiative's effect, and, specifically, that the voters should be advised that "they are adopting term limits for life."[37] We agree. In the state's supplemental brief, however, Professor Elhauge argues that it is *immaterial* whether the voters understood that Proposition 140 imposed lifetime limits. That is so only in the narrowest sense. If the voters were not adequately informed of the lifetime ban, voter ignorance because of lack of notice is highly material. The state supreme court, the state now urges, "is a lawmaker" for federal constitutional purposes. Supp. Br. at 8. According to the state, we may invalidate the initiative measure only if its effect, *as subsequently construed by the California Supreme Court*, violates the Constitution, and not because the measure itself as put to the voters concealed its true objective and precluded a fair expression of the voter's will.

We of course acknowledge that the interpretation of a state statute by the state's highest court "puts . . . words into the statute as definitely as if it had been so amended by the legislature." *Winters v. New York*, 333 U.S. 507, 514 (1948); *see also, e.g., Poulos v. New Hampshire*, 345 U.S. 395, 402 (1953). This line of authority, however, is essentially inapplicable. The issue we face and answer here is *not* how to construe a state statute that has already been

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[37] In response to the court's question, "Must it be clearly put to [the voters] so that they know what they are voting on – so that they know that they are adopting these term limits for life?," Professor Elhauge stated, "Well, I think if the question is should it be put to them that they are adopting term limits for life, uh, yes. And I think the answer to that is yes."

construed by the state supreme court, but whether a state may impose severe burdens on people's most fundamental constitutional rights through an initiative measure that is ambiguous when presented to the voters and that fails adequately to inform the people at the time they cast their ballots that they are being asked to limit their most fundamental rights. It is the measure as presented to the people, and the extent to which that measure informs the voters of the burden that it would impose on their fundamental rights, with which we are concerned – not the "meaning" of the measure as it is subsequently construed or limited by the state supreme court. The meaning afforded a state law by a state's highest court determines the meaning we give the law; it does not resolve the question whether the measure sufficiently advised the voters of the limitations to be imposed. Given that federal courts are charged with protecting the people's fundamental constitutional rights against undue intrusion by the states, the latter question surely is of federal concern.

Due process and the Supreme Court's established practice of requiring considered decision-making in highly sensitive areas of constitutional law compel our holding. Although we fully accept the California Supreme Court's construction of Proposition 140, the Constitution requires us to invalidate an initiative if it fails to provide adequate notice to the voters that it would severely burden the people's fundamental rights. Here, we hold as a matter of federal law that the state may not enforce Proposition 140's lifetime legislative term limits because the provision imposes a severe limitation on the people's fundamental right to elect whomever

they choose and the voters were not provided with adequate notice of that limitation.[38]

Although we recognize and appreciate that states have an important constitutional interest in designing their own political institutions, we conclude that when a state uses an initiative to adopt a form of governmental structure that severely burdens the fundamental rights of voting and association, due process requires that the state give the voters notice of the limitation that the measure would impose. Absent adequate notice, we cannot hold

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[38] We also note that requiring a state to provide adequate notice of an initiative's principal effect if that effect is to severely burden the people's fundamental rights, constitutes a reasonable and effective method of safeguarding the people's right to a republican form of government. Although the Court in *Pacific States* ruled that the Guaranty Clause, U.S. Const., art. IV, § 4, did not impose a substantive limitation on the states' ability to enact laws through the initiative process, nothing in that holding disqualifies federal courts from utilizing other techniques of judicial review to protect the constitutional values at stake. In fact, this is a very similar method to the one that the Court utilizes to protect the constitutional values implicated by its refusal to draw substantive boundaries to cabin the nondelegation doctrine, *see Mistretta v. United States*, 488 U.S. 361, 371-79 (1989), and to protect states' "fundamental functions" from federal intrusion under the Commerce Clause. *Compare Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding such intrusion nonjusticiable) *with Gregory*, 501 U.S. at 457-64 (adopting plain statement rule). Precisely because the people may enact any type of law they wish by initiative, and because most of the deliberative filters of legislation have been removed, federal courts must ensure that states do not exploit the deficiencies of direct democracy to limit the people's rights through ambiguous initiatives that fail to disclose the true objectives of the measure.

that the people intended severely to burden their most fundamental right, the right to vote. In matters this important, the state simply must tell its citizens what they are voting on.

V. Conclusion

This conclusion leaves us no choice but to invalidate the legislative-term-limits provision of Proposition 140. As we stated above, and as the state correctly reminds us, the California Supreme Court's determination that the measure imposes a lifetime ban, *Eu*, 816 P.2d at 1316, prevents us from narrowly construing the initiative potentially to save its constitutionality; "[w]e must take the statute as though it read precisely as the highest court of the State has interpreted it." *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940); *accord Easyriders Freedom F.I.G.H.T.*, 92 F.3d at 1494 n.4.

Nor may we sever the lifetime limits requirement. Severability is a question of state law. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985). California law prescribes three criteria for severability: (1) the invalid provision must be mechanically and grammatically separable; (2) it must be functionally separable; and (3) the remainder of the law would have been adopted by the legislative body if it had foreseen the partial invalidity of the law. *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247 (Cal. 1989). Putting aside the difficulties discussed, *supra* at 41-42, surrounding any attempt to divine the "intent" of the people, it is apparent that the first criterion is not met here. There is no lifetime limits "provision" that is "mechanically and grammatically separable." *Id.*

Hence, we have no choice but to invalidate the provision for legislative term limits. In doing so, however, we reiterate that we express no view as to the right of the state to adopt lifetime term limits for legislative office. That is an important and difficult constitutional question, but it is one that we defer to another day.

The judgment of the district court is

AFFIRMED.

SNEED, Circuit Judge, Dissenting:

I respectfully dissent. The majority opinion states its holding as follows:

> Here, we hold as a matter of federal law that the state may not enforce Proposition 140's lifetime legislative term limits because the provision imposes a severe limitation on the people's fundamental right to elect whomever they choose and the voters were not provided with adequate notice of that limitation.

Maj. op. p. 48.

The holding of this court ought to be:

> The wording of Proposition 140 and the context in which it was debated before the election was sufficiently expressed to assure an informed vote thereon and Proposition 140 does not contravene the Fourteenth Amendment and the Bill of Rights as incorporated therein.

The voters were properly informed that Proposition 140 imposed lifetime limits and it does not "limit their most fundamental rights." In fact, Proposition 140 is an expression of the fundamental right of the citizens of California to be served by state legislators holding office for such terms as they direct.

I.

NOTICE

The ambiguity issue raised by the majority was resolved satisfactorily by the Supreme Court of California in *Legislature v. Eu*, 54 Cal. 3d 492 (1991). In *Eu*, a suit by the California legislature challenging Proposition 140, the court discussed the question of whether the initiative imposes a lifetime ban on officers who have served the specified number of terms. The court did note that "the language of Proposition 140 is ambiguous as to its intent to impose a lifetime ban." *Eu*, 54 Cal. 3d at 504. Under California law, however, it is appropriate for the court to

examine indications of voter intent that lie outside the four corners of the initiative. *Kennedy Wholesale, Inc. v. State Bd. of Equalization,* 53 Cal. 3d 245, 250 (1991). The majority, by relying on *Thompson v. Oklahoma,* 487 U.S. 815, 857 (1988), accept this principle of interpretation. In conducting this inquiry, the *Eu* court found ample indications of the voters' intent by analyzing comments in the official ballot pamphlet. These comments "strongly support" the claim that a lifetime ban was contemplated by both the framers of Proposition 140 as well as the voters who approved it. *Eu,* 54 Cal. 3d at 505-06.

The "Argument Against Proposition 140," included in the ballot pamphlet accompanying the initiative, clearly states that legislative officers are "banned for life" after serving a set number of years. Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with argument to voters, Gen. Elec. (Nov. 6, 1990), p. 70-71. In fact, as the *Eu* court observed, the argument utilizes such unambiguous phrases 11 times. So too, an examination of the proposition by the Legislative Analyst noted that the term limits provision limited "the number of terms an elected state official can serve in the same office," saying nothing about a possible return to office at any point in the future. *Id.* at 69. Nowhere in the statements made by Proposition 140 advocates is the claim made that a lifetime ban is not imposed by the measure. *Id.* at 70-71. This powerful evidence led the court to properly conclude that the average voter would have known that Proposition 140 imposed lifetime term limits. *Eu,* 54 Cal. 3d at 505. The indicia of voter awareness and intent, however, are even stronger than the California Supreme Court suggested.

In 1990, voters had not one but two term limit measures on which to pass judgment. In addition to Proposition 140, a coalition of reform-minded groups placed Proposition 131 on the ballot. Proposition 131 limited state executive officers to up to eight consecutive years of service, while legislators were restricted to 12 years in office. Proposition 131, however, also *explicitly* allowed officeholders to regain their eligibility to run for the same elected position in the future, provided they sat out at least one term. The comments in the ballot pamphlet regarding Proposition 131 made it clear that the initiative imposed only consecutive, as opposed to lifetime, limits. Ballot Pamp. at 32.

Moreover, the clear choice facing voters – between the lifetime limits (imposed by Proposition 140) and consecutive term limits (imposed by Proposition 131) – received extensive media attention. *See, e.g.*, Paul Jacobs, *Term Limits Would Oust Lawmakers and a System*, L.A. Times, Oct. 13, 1990, at A1 (noting that Proposition 140 would limit "lifetime service" in the legislature, while Proposition 131 would "force members of each house to move on after 12 consecutive years," but would also allow them to run again after "sitting out a term."); Steven A. Capps, *Lawmakers lying low in Capitol quietly fighting Props. 131, 140*, S.F. Examiner, Sept. 16, 1990, at B1 (noting that "most legislators consider Prop. 140 the more evil of the two initiatives" because it would impose "lifetime term limits.").

In addition to the usual media attention afforded controversial ballot measures, the distinction between the two term limit schemes offered by Propositions 131 and 140 was highlighted even further when, five days before

the election, the California Supreme Court issued a ruling directly involving the two initiatives. The court announced that when voters approved propositions that were in fundamental conflict, no part of the ballot measure receiving the fewer votes may take effect. *Taxpayers To Limit Campaign Spending v. Fair Political Practices Comm.*, 799 P.2d 1220 (Cal. 1990). This decision was widely interpreted to potentially impact Propositions 131 and 140, should voters approve both measures. *See, e.g.*, Philip Hager & Richard C. Paddock, *Proposition With Most Votes Would Nullify Rival*, L.A. Times, Nov. 2, 1990, at A1 (noting that "Propositions 131 and 140 on Tuesday's ballot conflict because they would impose different term limits for office holders.").

As of Sept. 30, 1990, polls indicated that voters were in favor of Proposition 131 by 50 percent to 34 percent, with 16 percent undecided. Proposition 140 was supported by 55 percent and opposed by 28 percent, with 17 percent undecided. George Skelton, *Legislative Term Limits Backed by Big Margin*, L.A. Times, Sept. 30, 1990, at A1. Only a week later, however, Proposition 131 was rejected by a margin of nearly two-to-one, while Proposition 140 was approved. This clearly suggests that the state Supreme Court decision may have prompted voters to make a conscious choice between what particular term limits plan they desired to implement, rather than expressing general support for both plans as the polls suggest they did prior to the ruling. Alternatively, it may be that other differences between the propositions swayed voters in the closing days of the campaign.[1] In any event, it is

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[1] Proposition 131 would have allowed taxpayers to divert up to $5 per year of their state taxes to a special election fund

abundantly clear that the issue was widely discussed and publicized. *See California Newspapers Fill Out Their Ballots*, L.A. Times, Nov. 4, 1990, at M8 (listing 31 California newspapers that had taken an editorial position on both Propositions 131 and 140). Indeed, it is fair to say that the juxtaposition of two conflicting term limit provisions in the same election makes it highly likely that voters were aware about the true nature of their ballot choice.

There is nothing in this record to suggest that any possible confusion on the part of California voters provides a basis for this Court to employ its power under the second sentence of Section 1 of the Fourteenth Amendment to set aside a state election. The people of California understood what they were voting for. The text of Proposition 140 indicates it was intended to curb "[t]he ability of legislators to serve unlimited number of terms." Ballot Pamp. at 137 (Text of Proposed Law). To effectuate that end, the drafters of the measure stated precisely that "[n]o Senator may serve more than 2 terms . . . [n]o member of the Assembly may serve more than 3 terms . . . " Id. As the majority sees it, the absence of the words "during a lifetime" invalidates the proposition's favorable vote. For the want of three words the proposition fails. To such uses is the revered Fourteenth Amendment now employed!

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that would provide partial funding for the campaigns of all state officials. It would also have instituted a ban on non-election year fund raising, and limited total spending for candidates who refused public funds. Proposition 140 slashed operating funds for the legislature and eliminated the legislative retirement system.

The Twenty-Second Amendment to the Constitution does not employ the clause "during a lifetime." It provides, "[n]o person shall be elected to the office of the President more than twice . . . " U.S. Const. amend. XXII. It is obvious that it means "during a lifetime." Similarly, the language "no (Senator or Assembly member) may serve more than (2 or 3) terms" also obviously means service "during a lifetime."

The majority can discover "ambiguity" and a failure to adequately inform the people only by distorting the precise language of Proposition 140 and employing a canon of construction resembling that which once applied in the common law in an action on the covenant. Bouvier's Law Dictionary 251-52 (3d ed. 1934).

II.

RIGHTS OF VOTERS

Nonetheless, the majority relies primarily on the assertion that Proposition 140 limits the fundamental right of voters to vote for those legislators who no longer can seek a previously held office. By linking this proposition with its earlier determination that Proposition 140 did not provide adequate notice to the voters of its meaning, the majority reaches its improper and intrusive holding.

This holding represents a remarkable intrusion by the federal judiciary into the voter initiative process in the State of California and all other states in this circuit having such a process. It means, at the very least, that a term limits initiative measure can become effective only

when approved by the federal courts. Only then can it be determined that proper notice was given or that the lack of such notice did not affect the outcome. The likelihood of similar safeguards being designed by which other types of voter initiatives may be measured is not remote.

However, for purposes of this dissent, it will be assumed that the majority's holding is applicable only to voter initiatives instituting term limits. As to such it holds they "impose a severe limitation on the people's fundamental right to elect whomever they choose." Such voter initiatives can be *rejected* by a majority of the voters, but apparently they cannot be *adopted* by a majority, no matter what its size, without the intensive judicial scrutiny set forth above. This lack of symmetry exposes the flaw in the majority's "fundamental right" impairment analysis. The majority opinion regards term limits as specifically directed at a group of voters having nothing in common other than the fact that they lost an election on term limits. To provide protection to this group, the majority opinion creates a fundamental right "to elect whomever they choose." This amounts to holding that when a majority of voters impose term limits on state legislators they engage in a constitutionally suspect act, suggesting a form of discrimination deserving strict scrutiny for purposes of determining the Fourteenth Amendment's application.

The flaw in this reasoning is that there is no constitutional right "to elect whomever they choose" when the majority of the electorate has determined a candidate is not entitled to serve. To suggest otherwise must be rooted in an antipathy to term limits for which our national experience provides no basis. The Constitution of the

United States in Article I, Sections 2 and 3 imposes qualifications that a person must meet to become a Representative or Senator in the Congress of the United States. Moreover, the Supreme Court has upheld several state-imposed restrictions which in one way or another have limited a voter's right to elect "whomever they choose."

For example, *Burdick v. Takushi*, 504 U.S. 428 (1992) upheld a state-imposed prohibition on voting for candidates who have not filed nominating papers and whose names do not appear on the ballot. The majority attempts to distinguish this case on the grounds of inadequate notice, a grounds already refuted. Similarly, the Supreme Court upheld a state requirement that a minority party candidate for a partisan office must have received at least one percent of all votes cast for that office in the state's primary election in order to have his or her name placed on the general election ballot. *Munro v. Socialist Workers Party*, 479 U.S. 189 (1996). The restriction in the former was treated as "a very limited one," *id.* at 437, and in the latter as a "reasonable restriction on ballot access." *Id.* at 195.

Even more restrictive measures were upheld by the Supreme Court in *Clements v. Fashing*, 457 U.S. 957 (1982). The first such measure was a requirement that certain elected and appointed officeholders who became candidates for a different elective office are deemed to have automatically resigned from their current office. The second measure required that certain officeholders complete their current term before being eligible to serve in the legislature. Both measures were upheld against claims based on the First Amendment and the Fourteenth Amendment's Equal Protection Clause.

The Court focused on two lines of "ballot access" cases. First are those involving classifications based on wealth, and those involving classification schemes that impose burdens on new or small parties or independent candidates. Both must be subjected to heightened scrutiny. *Id.* at 962-65. With respect to other ballot access restrictions, however, the Court stated that "neither the Equal Protection Clause nor the First Amendment authorizes this Court to review . . . the manner in which a State has decided to govern itself." *Id.* at 972. Clearly, state-imposed term limits on legislators fall within this latter category; they constitute a "manner in which a State has decided to govern itself."

Three cases decided prior to those just mentioned also involved state laws that can be placed under the heading of state self-governance. These were *Storer v. Brown*, 415 U.S. 724 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974); and *Jenness v. Fortson*, 403 U.S. 431 (1971). In *Storer*, the Court upheld a provision forbidding a ballot position to an independent candidate for elective office if that person had a registered affiliation with a qualified political party within one year prior to the primary election in which the person seeks to run as an independent. 415 U.S. at 736.

The Court in *American Party of Texas* also rejected several constitutional challenges to the Texas Election Code. In so doing, it observed that the Code "affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more." 415 U.S. at 788.

In *Jenness*, the Court upheld a substantial barrier to access to the ballot in the general election by a candidate who did not enter and win a political party's primary election. Access by such a person required that there be filed on his behalf a nominating petition signed by at least five percent of the eligible voters. *Id.* at 432.

These authorities amply demonstrate that there is no "fundamental right to vote for whomever one chooses." True, the right to vote cannot be restricted by a classification or requirement based on wealth. *See Lubin v. Panish*, 415 U.S. 709 (1974) (large filing fee to gain access to the ballot in a primary election for County Supervisor was a denial of equal protection). A similar holding was reached in *Bullock v. Carter*, 405 U.S. 134 (1972). Term limits, however, embody no discrimination between voters or office seekers on the basis of race, creed, color, or wealth. Rather, one who has had the honor of serving the required number of terms can simply no longer stand for election nor can his or her supporters vote for them. Term limits is a device which its proponents insist will improve government. Whether it does so or not poses no federal constitutional question.

III.

U.S. TERM LIMITS, INC. v. THORNTON, 514 U.S. 779 (1995)

Thornton does not support the arguments against term limits. At page 837 of the majority opinion, the Court stated:

> Term limits, like any other qualification for office, unquestionably restrict the ability of

> voters to vote for whom they wish. On the other hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents. It is not our province to resolve this long-standing debate.
>
> We are, however, firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework.

Thus, *Thornton* did not hold that term limits per se are unconstitutional. What it held was that the Qualifications Clause of the Constitution, Article I, Section 5, proscribed the establishment of term limits by a state for its representatives and senators serving in the Congress of the United States. 514 U.S. at 831. In so holding, it rejected the argument that the "Times, Places and Manner of holding Elections" Clause, Article I, Section 4, which vested authority in the states to prescribe such matters, compelled a different result. *Id.* at 832.

The constitutional philosophy supporting this holding was expressed concisely by Justice Kennedy in his concurring opinion:

> Federalism was our nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from inclusion by the other. The resulting Constitution created a legal system and form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who

> sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution. 514 U.S. at 838-39.

Thus, *Thornton* does not control this case. Its reach is limited to proscribing efforts by the states to limit the terms of members of the Congress of the United States chosen by the electorate of such states. It imposes no constitutional bar to term limits enacted by a direct vote of the people of a state on their representatives in the state's legislature.

IV.

TERM LIMITS AS A POLICY

Term limits, to repeat, are part of the Constitution of the United States, with respect to the office of the President of the United States. U.S. Const. amend. XXII. As a constitutional amendment properly adopted, it is not considered, even though beyond challenge in federal courts, to constitute a provision out of harmony with the remainder of the Constitution. It reflects a policy initiated by President Washington and followed by many presidents prior to the adoption of the Amendment.

Term limits applicable to executive and legislative officials has an appeal to the ordinary citizen whose instincts and experience strongly suggest that such officials can, and sometimes do, abuse the power they possess. Even judges do not always escape this public suspicion, despite the fact that their power is more passive and quite procedurally circumscribed.

The support for term limits is not solely instinctual, however. Several substantial rational arguments can be made in their favor. The strongest is that long-term state legislators inevitably create a power center within the body in which they serve that often results in providing more financial and other types of benefits to their constituency than to other constituencies. This enhances the prospects of their reelection and the continuation of their practices. In time this uneven and often excessive misallocation of public resources becomes visible even to those members of the public who seldom devote close attention to state legislative activities. To this portion of the public, as well as to some who follow these matters more closely, the imposition of term limits appears to be a way to limit this tendency.

Legislative fiefdoms resulting in long-term service by a legislator also can enable that legislator to defy the majority will, at least for a significant period of time, on a matter of statewide importance. Less frequently, but of more serious consequences, is the legal and moral corruption of the long-term legislator. Whether Lord Acton was completely right or not, it is a fact that substantial power long held is a fertile source from which corruption can spring.

However, the arguments against term limits are also strong. First, our experience with Congress and other state legislative bodies is that unbroken service by a legislator or congressman provides the states and the United States with many persons of great experience and wisdom, without whom all would be poorer and less enlightened.

Moreover, there is force in the contention that the people of a particular constituency should be entitled to elect an incumbent for as long as they choose.

The truth is that term limits and their absence are both reasonable policies with respect to those who serve as state legislators. Moreover, the states, consistent with their unique ability to serve as a laboratory in which certain political theories and practices are tested, should be permitted to experiment with term limits. To impose a constitutional ban against California's term limits experiment is both improper and insensitive to the federal nature of the United States. Experiments of this type are an often heralded feature of federalism. *See, e.g., New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) Brandeis, J., dissenting ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . "). To employ the Fourteenth Amendment to frustrate such experiments is to diminish one of its fundamental purposes, which was to secure for all persons the opportunity to participate in the political processes of the states. It does not guarantee that an individual should be permitted to hold a particular legislative office indefinitely.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TOM BATES; EDWARD H. LYMAN; RICHARD STERLING; ARDIS GRAHAM; RICHARD D. LEWIS; LAWRENCE J. BUCHALTER; JONATHAN BROWNING; RACHEL SHERMAN; MARTHA M. ESCUTIA; SYLVIA HERNANDEZ; ANA ROSA PENA; CLAUDIA NAVAR; BARBARA J. FRIEDMAN; SUSAN ZARAKOV; and HARRIET SCULLY [sic],

Plaintiffs,

v.

BILL JONES, Secretary of the State of California; BRADLEY J. CLARK; Alameda County Registrar of Voters; and CONNY MCCORMACK, Los Angeles County Registrar of Voters,

Defendants.

PETER F. SCHABARUM; LEWIS K. UHLER,

Intervenors.

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No. C 95-02638 CW

JUDGMENT

(Filed Apr. 23, 1997)

This action came on for trial before the Court, the Honorable Claudia Wilken, United States District Judge, presiding, and the issues having been duly tried and the Court having duly rendered its decision as set forth in the Findings of Fact and Conclusions of Law filed April 23, 1997,

IT IS HEREBY ORDERED AND ADJUDGED:

1. that the lifetime term limits provisions contained in section 2(a) of article IV of the California Constitution violate the United States Constitution;

2. that Defendants Clark and McCormack are enjoined from enforcing the lifetime term limits provisions contained in section 2(a) of article IV of the California Constitution against Plaintiffs and to accept the declarations of intention to be a candidate and the nomination papers when tendered by Plaintiffs Bates, Friedman, or Escutia; and

3. that Defendant Jones is enjoined from enforcing the lifetime term limits provisions contained in section 2(a) of article IV of the California Constitution against Plaintiffs, to accept and process the declarations of intention to be a candidate and the nomination documents of Plaintiffs Bates, Friedman, or Escutia, to certify Plaintiff legislators' eligibility to be candidates (if all other requirements are met), and to certify the elections results if Plaintiff legislators win the election.

Plaintiffs shall recover of Defendants their costs of action.

Dated: APR 23 1997

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TOM BATES; EDWARD H. LYMAN; RICHARD STERLING; ARDIS GRAHAM; RICHARD D. LEWIS; LAWRENCE J. BUCHALTER; JONATHAN BROWNING; RACHEL SHERMAN; MARTHA M. ESCUTIA; SYLVIA HERNANDEZ; ANA ROSA PENA; CLAUDIA NAVAR; BARBARA J. FRIEDMAN; SUSAN ZARAKOV; and HARRIET SCULLEY,

Plaintiffs,

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BILL JONES, Secretary of the State of California; BRADLEY J. CLARK; Alameda County Registrar of Voters; and CONNY MCCORMACK, Los Angeles County Registrar of Voters,

Defendants.

PETER F. SCHABARUM and LEWIS K. UHLER,

Intervenors.

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No. C 95-02638 CW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Apr. 23, 1997)

INTRODUCTION

Do the lifetime legislative term limits provisions of the California Constitution, as enacted by Proposition 140 in 1990, violate the United States Constitution? This question implicates some of the core values of our American system of government: majority rule, minority protections, the right to vote, the autonomy of the States, and the role of the federal courts in upholding constitutional principles.

Majority rule is the basic assumption of American government. The legitimacy of the democratic process, however, depends upon the ability of voters to express their political preferences at the ballot box. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Constitution provides a number of safeguards to protect the right of the people to vote for their representatives. Some of these safeguards are explicit, such as the right to vote regardless of race or gender. The United States Supreme Court has found others to be implicit, such as the principle of one person, one vote. The Supreme Court has observed that congressional term limits "violate that 'fundamental principle of our representative democracy . . . that the people should choose whom they please to govern them.' " *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1850, 1862 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

The United States Supreme Court has held that a State may impose reasonable, nondiscriminatory restrictions on the ability of citizens to vote for the candidate of their choice when the State has an important reason for imposing those restrictions. When a State's restrictions on the ability of potential candidates to run for office impose a severe burden on voters' or candidates' First or Fourteenth Amendment rights, however, the State must establish that those restrictions are narrowly tailored to accomplish compelling State interests. Otherwise the restrictions are unconstitutional. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Permissible restrictions typically require candidates to demonstrate a modicum of popular support or to comply with reasonable procedures meant to insure orderly elections.

California's version of lifetime legislative term limits differs from the restrictions that the Supreme Court has upheld in the past in that it imposes an absolute and permanent ban on the participation of a certain category of candidates: experienced legislators. This lifetime restriction on legislative service prevents voters who value legislative experience from expressing their preference when voting for their State legislators. It also permanently bars voters who support a particular term-limited candidate for the legislature from stating their support at the ballot box. Finally, it burdens voters' right to associate for the advancement of their political views by denying them the opportunity to rally around the candidates of their choice. California's version of term limits thus severely burdens the political process by denying voters the opportunity to vote for a category of candidates or for particular individuals whom they support.

California's sovereign interest in structuring its political institutions is due substantial deference. When a State restructures its political institutions in a manner that imposes a severe burden on the ability of citizens to vote for the representatives of their choice, however, the State must provide justifications in addition to its interest in determining its own political institutions. Otherwise State institutional decisions would be immune from federal constitutional scrutiny. The State also has a substantial interest in promoting political accountability. However, at the trial of this case, the State failed to establish, as it must, that a lifetime limit on legislative service is narrowly tailored to achieve this interest. Less restrictive versions of term limits would achieve the benefits attributed to lifetime term limits while imposing significantly less severe burdens on the rights of voters. Other reforms that do not restrict the ability of voters to vote for the candidates of their choice would also achieve the benefits attributed to lifetime term limits.

This Court does not lightly overrule the political judgment of the California electorate. However, it is the singular duty of a federal court to determine when political judgment must give way to constitutional principle. " 'One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-37 (1964) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)) (footnote omitted). When a law conflicts with the United States Constitution, it is the Constitution,

not the expressed will of a majority of the voters, that must govern the Court's decision. "It is, emphatically, the province and duty of the judicial department, to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).[1] Because California's extreme version of term limits imposes a severe burden on the right of its citizens to vote for candidates of their choice, and because it is not narrowly tailored to advance compelling State interests, it violates the First and Fourteenth Amendments of the United States Constitution.

PROCEDURAL BACKGROUND

Former Assembly member Tom Bates and some of his supporters filed this lawsuit in 1995, seeking to enjoin enforcement of California's term limits so that Bates could run for reelection in 1996 to an eleventh term in the Assembly. The Court permitted the official proponents of Proposition 140, Peter Schabarum and Lewis Uhler, to intervene as Defendants. *Bates v. Jones*, 904 F. Supp. 1080, 1086 (N.D. Cal. 1995).[2] The Court denied Plaintiffs'

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[1] The Ninth Circuit's recent observation that judges should not unnecessarily thwart the political will of the people does not negate the Court's duty to enforce the United States Constitution. *See Coalition for Economic Equity v. Wilson*, Nos. 97-15031, 97-15030, 1997 WL 160667, at *4 (9th Cir. Apr. 8, 1997). As the Ninth Circuit recognized, if an initiative violates the Constitution, the district judge must "remind[ ] the people that they must govern themselves in accordance with" constitutional principles. *Id.*

[2] In granting Intervenors' motion to intervene, the Court relied upon *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), which held that sponsors of ballot initiatives have standing to

motion for a preliminary injunction, as well as Defendant Secretary of State Bill Jones' motion to dismiss for failure to state a claim. *Id.* at 1098.

In March, 1996, Defendants moved for summary judgment, and Plaintiffs moved for leave to amend their complaint by adding as new Plaintiffs Assembly members Martha Escutia and Barbara Friedman and some of their constituents. The Court denied Defendants' motion for summary judgment and granted Plaintiffs' motion for leave to amend. Order, May 30, 1996.

Trial was conducted from October 15 to October 24, 1996. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law.

FACTUAL BACKGROUND

A. History of Term Limits

The movement to impose legislative term limits is a recent phenomenon, although one with some historical precedent in the eighteenth and nineteenth centuries.

The expectation that legislators would serve in office for a limited period of time, return to private life, and

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defend them against court challenges. Recently, the Supreme Court questioned the reasoning in *Yniguez*. *See Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1067-68 (1997). It is thus doubtful that Intervenors have standing. Because the State clearly does have standing to defend provisions of its own constitution, *Arizonans for Official English* does not affect the current posture of this case.

then perhaps serve again later, was widespread in colonial America. This practice was known as "rotation." Tr. 603 (Petracca).[3] Rotation was generally an informal social norm rather than a legal mandate, but the Frameworks of Pennsylvania and Delaware, drafted in the 1680s, explicitly required it. Tr. 604. However, no colony imposed a lifetime limit on legislative service. Tr. 609. After independence, the Articles of Confederation limited delegates to Congress to three years of service in any period of six years. *U.S. Term Limits*, 115 S. Ct. at 1865-66; Articles of Confederation, art. V. The bills of rights of Massachusetts, Virginia, and a few other States enunciated the principle of rotation, but did not impose specific limits on legislative service. Tr. 604, 608. Of the States, only Pennsylvania formally required legislators to leave office after a specified period of time. No State imposed a lifetime limit on legislative service. Tr. 609.

Although the Constitutional Convention considered proposals to require members of Congress to rotate out of office, none was adopted. Tr. 89 (Fiorina); Tr. 397 (Jacobson);[4] *U.S. Term Limits*, 115 S. Ct. at 1859 & n.22.

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[3] Mark Petracca was the State's expert witness on term limits. An associate professor of political science at the University of California, Irvine, he has written extensively in favor of term limits and is a member of the board of *Legal Limits*, a periodical which reviews legal cases involving term limits.

[4] Morris Fiorina and Gary Jacobson were Plaintiffs' expert witnesses. Fiorina is a professor of Government at Harvard University. He has written extensively about representation and electoral accountability. Jacobson, a professor of political science at the University of California, San Diego, has written extensively on congressional elections.

During most of the nineteenth century, rotation of office continued to be widely expected and practiced, but it was never formally imposed. Tr. 605 (Petracca). Especially after the presidency of Andrew Jackson, rotation came to be associated with the spoils system. It served as a device for insuring that the various elements of political coalitions all shared in the fruits of power. Tr. 90-91 (Fiorina). By the early twentieth century, however, rotation had become less prevalent. Tr. 607.

From the colonial era through the nineteenth century, the practice of rotation of office was distinct from the modern phenomenon of legislative term limits. Most importantly, rotation did not impose lifetime limits on the length of legislative service. Tr. 609 (Petracca); Tr. 91-92 (Fiorina). As the word "rotation" suggests, legislators were expected to serve for a period of time and then do something else, but former legislators were not barred from returning to the legislature after having taken some time off. Indeed, many nineteenth-century legislators were professional politicians. It was simply understood that one politician would not hold onto a particular office for a prolonged period of time. Tr. 92 (Fiorina). Candidates were generally not forbidden from seeking additional terms, and voters were not prevented from supporting them.

B. Professional Legislatures and Legislative Turnover

By the middle of the twentieth century, the ideal of a professional legislature capable of handling the complexities of modern, industrialized society and of countering

executive authority largely supplanted the ideal of a citizen legislature made up of representatives who would return to private life after brief periods of legislative service. Tr. 68, 84 (Fiorina). After the Second World War, Congress and many State legislatures, including California's, became increasingly professionalized. Tr. 345 (Jacobson). Indeed, in 1966, Californians approved Proposition 1A, which institutionalized the ideal of a professional legislature. Legislators' salaries rose, legislative staffing increased, and legislative supervision of the budgetary process became more sophisticated. Tr. 97 (Fiorina).

In the late 1980s and the 1990s, sentiment grew that legislators were becoming too secure and isolated and therefore less responsive to their constituents. As a remedy for this perceived problem, twenty-one States enacted some form of legislative term limits. Most States with term-limits provisions restrict the number of consecutive terms that legislators may serve or limit the number of years that an individual may serve as a legislator within a specified time frame. Six States other than California have imposed lifetime limits on legislative service.[5]

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[5] The seven States with lifetime limits on legislative service are Arkansas, Ark. Const. Amend. 73, § 2 (three terms in lower house, two terms in upper house); California, Cal. Const. art. V, § 2 (three terms in lower house, two terms in upper house); Michigan, Mich. Const. art. IV, § 54 (three terms in lower house, two terms in upper house); Missouri, Mo. Const. art. III, § 8 (eight years in one house, sixteen years in both houses); Nevada, Nev. Const. art. IV, §§ 3-4 (twelve years in lower house, twelve years in upper house); Oklahoma, Okla. Const. art. V, § 17A (twelve years service in both houses); and Oregon, Ore.

Most courts have rejected challenges to the constitutionality of term limits for State or local legislators.[6]

Const. art. II, § 19 (six years in lower house, eight years in upper house, or twelve years in both houses).

The fourteen States with some other form of term limits are Arizona, Ariz. Const. art. IV, pt. 2, § 21 (four consecutive terms); Colorado, Colo. Const. art. V, § 3 (four consecutive terms in lower house, two consecutive terms in upper house); Florida, Fla. Const. art. VI, § 4 (eight consecutive years); Idaho, Idaho Code § 34-907 (eight years of service within previous fifteen years); Louisiana, La. Const. art. III, § 4(E) (three consecutive terms); Maine, Me. Rev. Stat. Ann. tit. 21-A, § 553 (four consecutive terms); Massachusetts, Mass. Ann. Laws ch. 53, § 48 (four terms in preceding nine years); Montana, Mont. Const. art IV, § 8 (eight years within preceding sixteen years); Nebraska, Neb. Const. art. III, § 8 (two consecutive terms); Ohio, Ohio Const. art. II, § 2 (four consecutive terms in lower house, two consecutive terms in upper house); South Dakota, S.D. Const. art. III, § 6 (four consecutive terms); Utah, Utah Code Ann. § 20A-10-201 (twelve consecutive years); Washington, Wash. Rev. Code § 44.04.015 (six of previous twelve years in lower house, eight of previous fourteen years in upper house); and Wyoming, Wyo. Stat. § 22-5-103 (twelve of previous twenty-four years).

[6] *See Dutmer v. City of San Antonio*, 937 F. Supp. 587 (W.D. Tex. 1996); *League of Women Voters v. Diamond*, 923 F. Supp. 266 (D. Me.) (denying preliminary injunction), *aff'd*, 82 F.3d 546 (1st Cir. 1996); *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816, 817 (S.D. Ohio 1993), *aff'd on other grounds*, 45 F.3d 126 (6th Cir. 1995); *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994), *aff'd on other grounds*, 115 S. Ct. 1842 (1995) (the constitutionality of State legislative term limits was not presented to the United States Supreme Court); *Legislature v. Eu*, 54 Cal. 3d 492 (1991), *cert. denied*, 503 U.S. 919 (1992); *Roth v. Cuevas*, 603 N.Y.S.2d 962 (Sup. Ct.), *aff'd*, 603 N.Y.S.2d 736 (App. Div.), *aff'd*, 624 N.E.2d 689 (N.Y. 1993). *But see Thorsted v. Gregoire*, 841 F. Supp. 1068,

C. Proposition 140 and *Legislature v. Eu*

In the late 1980s, the California legislature was perceived by some to be under the control of a group of entrenched politicians more concerned with their own political survival than with the interests of their constituents or the well-being of the State. Proposition 140 was promoted as a means to break the grip of career politicians on the legislature and to promote greater public participation in the political process. The statement of purpose in Proposition 140 pronounced,

> The people find and declare that the Founding Fathers established a system of representative government based upon free, fair and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.
>
> The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the

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1081-82 (W.D. Wash. 1994) (term limits on congressional service violate First and Fourteenth Amendments), *aff'd on other grounds*, 75 F.3d 454 (9th Cir. 1996). For a discussion of the analysis of term limits in *Eu*, see the Court's previous published opinion on this case, *Bates*, 904 F. Supp. at 1093-95.

> bureaucracy, rather than of the people whom they are elected to represent.
>
> To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

Cal. Const. art IV, § 1.5. Proposition 140 restricted retirement benefits for legislators, reduced the legislature's budget, and amended section 2(a) of article IV of the California Constitution to limit senators to two four-year terms and Assembly members to three two-year terms.[7] It also imposed term limits on a variety of other State offices. The present lawsuit does not challenge term limits on non-legislative offices.

On November 6, 1990, California voters approved Proposition 140 by a margin of 52.17% to 47.83%. The degree of support for Proposition 140 varied widely throughout the State. For example, in Assembly District 12, Bates' district prior to the 1992 reapportionment, 62.9% of the voters opposed the measure. In Assembly District 46, the district to which Friedman was originally

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[7] Section 2(a) reads in its entirety:

The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years. *No Senator may serve more than 2 terms.*

The Assembly has a membership of 80 members elected for 2-year terms. *No member of the Assembly may serve more than 3 terms.* (emphasized passages added by Proposition 140).

elected, 59.5% of the voters voted against Proposition 140. A majority of the voters in thirty of California's eighty assembly districts voted against the initiative. In other assembly districts, of course, significant majorities supported term limits. *See* Supplement to Statement of Vote November 1990, Tr. Ex. 44.

In 1991, the California legislature, a number of individual members of the legislature, and some of their constituents challenged the facial validity of Proposition 140 by filing a petition for a writ of mandate in the California Supreme Court. The California Supreme Court exercised its original jurisdiction over the petition because of the great public importance of the issues raised by the challenge. *Eu*, 54 Cal. 3d at 500. The California Supreme Court evaluated the challenge to Proposition 140 on the basis of the briefs and other papers submitted by the parties and *amici curiae*. No trial was conducted, and no lower court examined the merits of the parties' legal or factual contentions.

The California Supreme Court upheld most of the provisions of Proposition 140, including legislative term limits. *Id.* at 501. It also rejected the position advanced by the State Attorney General on behalf of the Secretary of State of California that the term limits provisions of Proposition 140 simply limited the number of consecutive terms that legislators may serve. *Id.* at 503. It instead held that Proposition 140 imposed a lifetime limit on service in the legislature. *Id.* at 506.

The California Supreme Court's holding that Proposition 140's lifetime legislative term limits provisions do not violate the United States Constitution does not bind

federal courts. *See Watson v. Estelle*, 886 F.2d 1093, 1095 (9th Cir. 1989) (State supreme court decisions construing federal Constitution do not bind federal courts). However, its construction of the term limits provisions of Proposition 140 does. *See Arizonans for Official English*, 117 S. Ct. at 1074-75 (State supreme courts provide definitive constructions of State laws). This Court, therefore, may not narrowly interpret the term limits provisions of Proposition 140 to avoid its constitutional difficulties.

D. The Parties

Between 1977 and 1996, Plaintiff Tom Bates represented the area comprising the current 14th Assembly District. The precise borders of his district have changed with each reapportionment, but it has consistently included the city of Berkeley and adjoining neighborhoods. The district has reelected Plaintiff Bates by wide margins since the 1990 elections. In 1992, he received 85.41% of the vote in the Democratic primary and 82.14% in the general election. In 1994, he was unopposed in the primary and received 78.5% of the vote in the general election. Tr. Ex. 2. Pursuant to Article IV, section 2(a) of the California Constitution, Bates was not allowed to run in the November, 1996, election and may never again run for the California Assembly. Bates may run for other offices, including the State Senate, but he would prefer to serve in the Assembly because he is already familiar with his assembly district and with the workings of the Assembly itself. Tr. 171.

Bates testified that term limits are detrimental to the ability of legislators to represent their constituents effectively. According to Bates, it takes time for legislators to become familiar with their own districts and to develop areas of expertise. He believes that, as legislators gain expertise, their dependence upon lobbyists and executive branch agencies diminishes. Tr. 197-98. Legislators also become more skilled in navigating the complexities of the legislative process. Coaxing bills through the legislature can take years of education and coalition building. Tr. 193, 211-12. Passage of legislation, however, is only the first step in implementing the priorities of constituents. A reluctant executive branch can thwart legislative enactments in a variety ways [sic], such as by providing inadequate funding. Tr. 172. According to Bates, experienced legislators are more attuned to the ways in which the executive can circumvent legislative intent and are therefore more capable of ensuring that legislative enactments are actually implemented. Finally, according to Bates, experienced legislators who are likely to remain in the legislature for a significant period of time carry greater clout in their dealings with administrative agencies because the administrators realize they will probably have to continue dealing with those legislators in the future. Tr. 182. Term limits, Bates concluded, weaken the legislature and impede the ability of the legislature to enact reforms.

Plaintiffs Jonathan Browning, Lawrence Buchalter, Ardis Graham, Richard Lewis, Edward Lyman, Rachel Sherman, and Richard Sterling, voters in the 14th Assembly District, would have voted for Bates in 1996 if he had

been a candidate. The voter Plaintiffs believe that Plaintiff Bates was an exceptional representative, who served his constituents well and was unusually concerned with and effective at representing the needs of low-income and disabled citizens and protecting the environment. They do not believe that other candidates would represent them as effectively and as well as Bates. Some of the voter Plaintiffs testified that Bates' legislative experience was an important reason for their support and that they tend to prefer candidates with legislative experience over candidates without legislative experience. Tr. 159-60 (Buchalter); Tr. 132 (Lyman).

Plaintiff Martha Escutia was first elected to represent the 50th Assembly District in Los Angeles in 1992. She received 46.81% of the vote in the 1992 Democratic primary and 75.04% in the general election. In 1994, she was unopposed in the primary and received 74.65% of the vote in the general election. She was unopposed again in the 1996 primary and was reelected to her third term in the general election. Tr. Ex. 25. In the absence of term limits, she probably would have run for either the Assembly or the Senate in 1998. Term limits prevent her from running for reelection to the Assembly, although not from running for election to the Senate.

At trial, she testified that during her first term she spent much of her time learning the legislative process. From her observation, legislators serving their final term became less effective because people dealing with them knew that they would soon be gone. She therefore fears that term limits will strengthen lobbyists and the executive branch at the expense of the legislature. Tr. 465-66.

She also believes that term limits impede the formation of experienced minority leadership. Tr. 483.

Plaintiffs Sylvia Hernandez, Claudia Navar, and Ana Rosa Pena are voters in the 50th District who have voted for Escutia in the past, planned to vote for her in 1996, and would like to have the opportunity to vote to reelect her to the Assembly in 1998. Plaintiff Hernandez testified that she supports Escutia not only because of her stances on important political issues such as immigration, but also because of personal characteristics such as determination, commitment, and her approach to problem solving. Tr. 271. Hernandez believes that Escutia has become a more effective legislator over time. Tr. 274.

Plaintiff Barbara Friedman was elected to represent the 46th Assembly District in Los Angeles County at a special-election on July 30, 1991. Since reapportionment, she has represented the 40th Assembly District, also in Los Angeles County. She received 15.99% of the vote in the 1991 special primary election and 72.54% in the special run-off election. She received 71.26% of the vote in the 1992 Democratic primary and 57.83% in the general election. In 1994, she was unopposed in the Democratic primary and garnered 57.92% of the vote in the general election. Tr. Ex. 28. Term limits prevented her from running for reelection in 1996.

Friedman opposes term limits because they do not take into account the time it takes to master the legislative process, to become familiar with one's assembly district, and to train staff. Tr. 29-32. She believes that term limits will weaken the legislature's institutional memory

and its ability to attract and retain skilled staff members. Tr. 33, 36.

Plaintiffs Harriet Brown Sculley and Susan Zarakov live in the 40th Assembly District, have voted for Friedman in the past, and would have liked to vote for her in 1996. Plaintiff Sculley testified that she supports Friedman not only because of her political positions, but also because she likes Friedman's style, responsiveness, and accessibility. Tr. 9-10. She believes that Friedman became a more effective representative in Sacramento the longer she served there. It was important for Sculley that Friedman represented her in the Assembly rather than at some other level of government because Assembly members can more easily represent community interests than, for example, State senators. Finally, Sculley testified that she prefers to vote for candidates with legislative experience rather than for inexperienced candidates. Tr. 15.

ANALYSIS

I. The Legal Standard

The parties agree that the test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and explained in *Burdick v. Takushi*, 504 U.S. 428 (1992), is the proper standard to apply. The *Anderson-Burdick* test evolved as the Supreme Court has considered the significance to assign to the First and Fourteenth Amendment rights implicated in "ballot access" cases, that is, challenges to laws governing the procedures and eligibility requirements for political parties or candidates to appear on ballots. *See, e.g., Burdick*, 504 U.S. 428 (upholding State's refusal to allow

write-in votes); *Norman v. Reed*, 502 U.S. 279 (1992) (striking down requirement that small political parties gather large number of signatures to appear on ballot for certain local elections); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding requirement that third party candidates receive 1% of primary vote in order to appear on general election ballot); *Anderson*, 460 U.S. 780 (striking down early filing deadline for third party candidates).

When determining the constitutionality of candidate eligibility requirements, a court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. *Burdick* explained that,

> the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a

> state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.

504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289, and *Anderson*, 460 U.S. at 788).

The test is thus hybrid. If the Court finds that California's version of legislative term limits imposes severe restrictions on Plaintiffs' First and Fourteenth Amendment rights, it must apply strict scrutiny. If the Court finds that the restrictions are not severe, it must balance the rights asserted by Plaintiffs against the precise interests advanced by the State to justify the burdens imposed on Plaintiffs' rights. When evaluating the State's interests, the Court must consider the extent to which those interests require the State to burden Plaintiffs' rights. Important regulatory interests of the State, however, are generally sufficient to justify "reasonable, nondiscriminatory restrictions."

Interests that the Supreme Court has held are sufficient to justify reasonable, nondiscriminatory restrictions on ballot access are usually related to the State's interest in conducting organized and fair elections. Thus, the Supreme Court has upheld requirements that new political parties or independent candidates demonstrate a modicum of popular support before being listed on ballots. *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). Similarly, restrictions on the ability of losing primary candidates to run in general elections have been approved. *Storer v. Brown*, 415 U.S. 724 (1974). The Court

has struck down requirements that it believes prevent the expression of dissenting or minority political viewpoints. *See, e.g., Norman,* 502 U.S. 279 (burdensome signature-gathering requirement for political parties); *Anderson,* 460 U.S. 780 (early filing requirement for third-party or independent candidates); *Lubin v. Panish,* 415 U.S. 709 (1974) (large candidate filing fees when imposed on low-income candidates).

As noted, the *Anderson-Burdick* test has evolved in ballot access cases. California's version of term limits, however, does not merely limit access to the ballot, it defines one of the qualifications for holding legislative office. *See U.S. Term Limits,* 115 S. Ct. at 1870 (cases in which Supreme Court has upheld ballot access restrictions on congressional candidates have not imposed substantive qualifications rendering a class of potential candidates ineligible). By preventing a class of potential candidates from running for legislative office and by denying voters the opportunity to vote for a class of potential candidates, term limits implicate First and Fourteenth Amendment rights at least as much as most ballot access provisions have. It would certainly be inappropriate to apply a more deferential test, such as rational basis review, to this case.

II. Application of the *Anderson-Burdick* Test to Term Limits

A. Individual Rights Implicated by Term Limits

The Supreme Court has repeatedly observed that laws defining the eligibility of candidates to appear on

the ballot implicate the constitutional rights of both candidates and voters. In *Anderson*, for example, the Court observed,

> 'the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.' Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.'

Anderson, 460 U.S. at 786 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). *See also Burdick*, 504 U.S. at 438; *Lubin*, 415 U.S. at 716; *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1990) ("the individual's right to seek public office is inextricably intertwined with the public's fundamental right to vote"), *cert. denied*, 501 U.S. 1252 (1991); *Erum v. Cayetano*, 881 F.2d 689, 691 (9th Cir. 1989).

The cases on which the *Anderson* Court relied identified voting and associational rights as the rights most directly implicated by candidate eligibility requirements. 460 U.S. at 786-87 n.7 (citing *Williams v. Rhodes*, 393 U.S. 23 (1968); *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974); *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173 (1979)). *See also Burdick*, 504 U.S. at 438 (ballot access restrictions affect voting rights); *Munro*, 479 U.S. at 193 (restrictions on access of political

parties to ballot impinge upon rights to associate and vote).

1. Voting Rights

" '[V]oting is of the most fundamental significance under our constitutional structure.' " *Burdick*, 504 U.S. at 433 (quoting *Illinois State Bd. of Elections*, 440 U.S. at 184). Indeed, " 'no right is more precious in a free country than that of having a voice in the election of those who make the laws under which . . . we must live.' " *Id.* at 441 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). The Fourteenth Amendment " 'confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population.' " *Lubin*, 415 U.S. at 713 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 n.2 (1973) (Stewart, J., concurring)). When announcing that seats in State legislatures must be apportioned on the basis of population, the Supreme Court declared, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Court explained that,

> representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. . . . Full and effective participation by all citizens in state government

> requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.

Id. at 565.

California's term limits provisions deny voters the opportunity to support experienced legislators. Term limits thus provide voters who prefer candidates who are not "career politicians" a structural advantage over those who support a particular experienced legislator or who prefer candidates with legislative experience in general. By denying some, but not all, voters the ability to vote for the candidates of their choice, term limits directly affect Plaintiffs' voting rights and their ability to participate on an equal basis in self-government.

Term limits thus burden Plaintiffs' Fourteenth Amendment right to participate on an equal basis with other voters in the election of their representatives. Term limits also burden Plaintiffs' First Amendment right of freedom of expression by imposing a content-based restriction on which candidates voters may vote for. The Supreme Court has held that States may impose reasonable, politically neutral restrictions on expressive activity at the polls. *Burdick*, 504 U.S. at 438. Term limits, however, are not politically neutral. They are a determination by the majority that one trait, legislative experience, is undesirable and that all voters should be prohibited from voting for candidates possessing that trait. A significant minority of voters are therefore absolutely precluded from expressing their political preference for experienced legislators when voting for their State representatives.

The Supreme Court has recently explained that congressional term limits are inconsistent with the ideal that the electorate should be able to choose its own representatives. In *U.S. Term Limits,* the Court observed that the imposition of term limits on Congress "would violate that 'fundamental principle of our representative democracy . . . that the people should choose whom they please to govern them.' " 115 S. Ct. at 1850, 1862 (quoting *Powell v. McCormack,* 395 U.S. 486, 547 (1969)). The Court quoted Robert Livingstone, who declared during the Constitutional Convention that, "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." *Id.* at 1851 (quoting 2 Elliot's Debates 292-93).

Although *U.S. Term Limits* is not controlling authority on the constitutionality of term limits for State legislatures, it does demonstrate how term limits impede Plaintiffs' abilities to have a voice in the selection of their representatives. By limiting Plaintiffs' ability to vote for their preferred candidates, the State is encroaching upon a fundamental principle of representative democracy.[8] Proposition 140 therefore burdens Plaintiffs' right to vote for the candidates of their choice and the right of "each citizen

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[8] That term limits were imposed by popular initiative rather than by the legislature does not protect them from judicial review. Popular initiatives are held to the same constitutional standards as other legislation. A majority of voters may not deprive individuals of constitutional rights, just as the legislature may not. *See U.S. Term Limits,* 115 S. Ct. at 1858 n.19; *Lucas v. Forty-Fourth General Assembly,* 377 U.S. 713, 736 (1964).

[to] have an equally effective voice in the election of members of his state legislature." *Reynolds*, 377 U.S. at 565.

2. Right to Vote for Particular Candidate

The State concedes that its term limits provisions prevent citizens from voting for particular candidates. It seeks to minimize the significance of this restriction by arguing that voters do not enjoy a fundamental right to vote for the particular candidate of their choice. This observation is correct in the sense that ballot access provisions are not automatically subject to strict scrutiny simply because they exclude candidates who do not comply with their requirements. In *Burdick*, for example, the Supreme Court upheld Hawaii's prohibition on write-in voting. 504 U.S. at 441. By denying voters the ability to cast write-in ballots, Hawaii prevented voters from voting for candidates who had not complied with Hawaii's elections procedures. The Court upheld Hawaii's ban on write-in voting because Hawaii provided aspiring candidates a variety of other means of gaining access to the ballot. *Id.* Thus, voters can be denied the opportunity to vote for a particular candidate, provided that constitutionally adequate alternative means for appearing on the ballot were available to that candidate.

California's version of term limits, however, does not simply create a procedural hurdle or impose a temporary restriction. It permanently denies voters the opportunity to vote for particular candidates as well as for any candidates with extensive experience as a State legislator. The State's argument that the voter Plaintiffs do not have a fundamental right to vote for a particular candidate at a

particular election is therefore not dispositive of Plaintiffs' challenge to the constitutionality of lifetime legislative term limits.

3. Freedom of Association

The right of voters "to cast their votes effectively" overlaps with "the right of individuals to associate for the advancement of political beliefs." *Williams*, 393 U.S. at 30. Although term limits do not directly prohibit individuals from associating for the advancement of common beliefs, they do limit the ability of individuals to take advantage of the galvanizing effects of elections on political organization. The exclusion of candidates from the ballot "burdens voters' freedom of association . . . because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson*, 460 U.S. at 787-88. *See also Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-25 (1989).

Term limits restrict Plaintiffs' freedom to associate because candidates who have been effective rallying points for political activity in the past are excluded from running for re-election. The voter Plaintiffs are thus denied the opportunity to rally political support behind their favored candidate for a particular office precisely because their favored candidate has been repeatedly successful in the past. Term limits therefore burden Plaintiffs' freedom of association by denying them the opportunity to use the device of a political campaign on

behalf of their favored candidate to promote their political goals.

4. The Right to Run for a Particular Office

The State also contends that individuals do not have a fundamental right to run as candidates for particular offices. *See Clements v. Fashing*, 457 U.S. 957, 963 (1982) (plurality opinion); *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); *Plante v. Gonzalez*, 575 F.2d 1119, 1126 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). As explained above, however, the right of a candidate to run for office is intertwined with the voting and associational rights of the electorate. The availability of political opportunity to particular candidates affects a broader range of interests than potential candidates' interests in seeking office. "[V]oters can assert their political preferences only through candidates or political parties. . . . The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters". *Lubin*, 415 U.S. at 716. *See also Burdick*, 504 U.S. at 438.

The interest of Plaintiffs Bates, Escutia, and Friedman in running for the Assembly therefore merits protection because their interest in running for office necessarily implicates the voter Plaintiffs' voting and associational rights.

B. Severity of the Burden Imposed by Term Limits

Proposition 140 thus burdens Plaintiffs' fundamental rights to vote on an equal basis with others and to associate for the advancement of their political views. That term limits burden fundamental rights, however, does not end the Court's inquiry. The Court must also determine the severity of the burden that term limits impose on these rights.

The Supreme Court has not articulated a test for determining when a burden is severe. By referring to "reasonable, nondiscriminatory restrictions," *Anderson* and *Burdick* hinted at some possible criteria for determining the severity of the burden, but the terms "reasonable" and "nondiscriminatory" are not self-defining.

One year before *Anderson*, the Supreme Court upheld a Texas provision which prohibited justices of the peace from running for the legislature if they would have to cut short their service as justices of the peace in order to serve in the legislature. *Clements v. Fashing*, 457 U.S. 957, 968 (1982). The Court determined that this limitation did not significantly limit ballot access because it imposed, at most, a two-year waiting period on justices of the peace who desired to run for the legislature. *Id.* at 967-68.

Unlike the restriction at issue in *Clements*, Proposition 140 imposes a lifetime ban on term-limited legislators from being elected to the legislature. The holding of the Supreme Court in *Clements*, which found that a brief waiting period does not constitute a significant barrier to candidacy, is not inconsistent with a finding that lifetime

term limits impose a serious burden on Plaintiffs' constitutional rights. Indeed, *Clements*, by emphasizing the short-term nature of the restriction imposed on Texas justices of the peace, lends support to a finding that permanently excluding a class of candidates from the ballot imposes a serious burden on candidates' and voters' rights.[9]

The district court evaluating the constitutionality of Maine's limit on consecutive terms of legislative service offered a related approach for evaluating the severity of the burden imposed by term limits. It observed that there are "two key indicators of when a restriction moves from legitimate to severe: whether the restriction is content based or content neutral, and the extent to which the alternative routes to ballot access minimize the restriction on the plaintiff's rights." *League of Women Voters v. Diamond*, 923 F. Supp. 266, 269 (D. Me. 1996) (denying preliminary injunction), *aff'd*, 82 F.3d 546 (1st Cir. 1996). The court concluded that consecutive term limits impose a

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[9] A plurality of the Court in *Clements* argued that the Court should focus on whether ballot access provisions exclude "certain classes of candidates from the electoral process." *Id.* at 964. The plurality would apply heightened scrutiny when a ballot access provision was based on wealth or imposed burdens on small political parties or independent candidates. Otherwise, the plurality urged the Court to apply heightened scrutiny only after examining the extent of the burden imposed by the restriction on candidacy. *Id.* at 966. The test articulated more recently by a majority of the Court is less concerned with the particular classification used than with the "extent and nature" of the impact of ballot access provisions on voters. *Anderson*, 460 U.S. at 786.

burden that is "clearly not *de minimis*" but that is also not sufficient to require strict scrutiny. *Id.* at 270.

The court justified its conclusion on two grounds. First, it argued that term limits "cannot fairly be characterized as content based" because such provisions do not "distinguish between or select among the range of ideas and political discourse from which voters can choose." *Id.*

A number of other courts have also emphasized the content neutrality of term limits when finding that they do not impose a severe burden on voters' rights. *Eu*, 54 Cal. 3d at 519; *Roth*, 603 N.Y.S.2d at 971.

Term limits are content neutral in the sense that they do not target candidates on the basis of the views they espouse.[10] They are not content neutral in another, important sense. Proposition 140 targets legislators with legislative experience. In 1990, approximately 47.83% of the California electorate, and a majority voters [sic] in thirty of California's eighty assembly districts, voted against the strict version of term limits imposed by Proposition 140. A portion of the vote against Proposition 140 was

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[10] However, some of the ballot access provisions that the Supreme Court has struck down were content neutral in this sense, too. Early filing deadlines or high filing fees do not explicitly target candidates on the basis of the message they espouse. The Supreme Court has found, however, that they are likely to impose burdens on the ability of some voters to express their preferences in the electoral process. *See Anderson*, 460 U.S. 780 (striking down early filing deadline); *Bullock v. Carter*, 405 U.S. 134 (1972) (striking down high filing fees).

cast by voters who desired to retain the ability to vote for experienced candidates.[11] Proposition 140 prevents this minority from voting for candidates possessing a desired characteristic simply because those candidates possess that characteristic. That characteristic, legislative experience, distinguishes conflicting political views about the best forms of political representation. Term limits skew the electoral process by preventing a significant minority from at least voting for, if not electing, candidates who embody a particular view of political representation that is opposed by the majority. Term limits thus impose a content-based restriction on the ability of voters to vote for the candidates of their choice. *See Thorsted v. Gregoire*, 841 F. Supp. 1068, 1082 (W.D. Wash. 1994), *aff'd on other grounds*, 75 F.3d 454 (9th Cir. 1996).

League of Women Voters also stressed that Maine's limit on consecutive terms does not completely foreclose ballot access to incumbents. 923 F. Supp. at 270.[12] Term-

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[11] It is difficult and unnecessary to determine precisely what portion of the electorate opposed term limits entirely. Another initiative on the November, 1990, ballot was Proposition 131, which would have instituted public campaign financing and limited Senators to three consecutive terms and Assembly members to six consecutive terms. Proposition 131 received only 37.75% of the vote. Tr. Ex. 50. No evidence was submitted to indicate how many voters supported the version of term limits in Proposition 131 but not the more extreme version in Proposition 140. Because Proposition 131 would not have imposed a lifetime limit on legislative service and provided for longer periods of uninterrupted service than Proposition 140, it would not have imposed the same kind of restriction on the ability of voters to vote for experienced candidates.

[12] At least two other cases in which term limits were upheld also involved limits on consecutive service. *Miyazawa v. City of*

limited legislators could sit out one or more terms and then run again, or they could run for a different office. *Id.* Proposition 140, in contrast, imposes a lifetime limit of three terms in the Assembly and two terms in the Senate. *Eu*, 54 Cal. 3d at 506. Although term-limited Assembly members may run for other offices, they are absolutely precluded from running for the Assembly. Proposition 140 thus imposes a significantly greater burden on voters' and candidates' rights than the burden imposed by Maine's limit on consecutive terms, which itself was "clearly not *de minimis*."

Proposition 140 prevents Plaintiffs from expressing their political preference for candidates with legislative experience. Term limits therefore restrict the ability of certain voters to participate in the electoral process on an equal basis with other voters because of their political preferences for a particular category of candidates or for an individual candidate. In addition, unlike the majority of States that have imposed term limits on State legislators, California's version of term limits imposes a lifetime limit on legislative service. California voters who value legislative experience or a particular candidate are not simply required to defer expressing their preference, they are forever prevented from expressing their preference at the ballot box. *See also U.S. Term Limits*, 115 S. Ct. at 1870 (congressional term limits disadvantage particular class

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Cincinnati, 825 F. Supp. 816, 817 (S.D. Ohio 1993), *aff'd on other grounds*, 45 F.3d 126 (6th Cir. 1995); *Roth v. Cuevas*, 603 N.Y.S.2d 962 (Sup. Ct.), *aff'd*, 603 N.Y.S.2d 736 (App. Div.), *aff'd*, 624 N.E.2d 689 (N.Y. 1993).

of candidates); *Thorsted*, 841 F. Supp. at 1082 (congressional term limits not neutral or nondiscriminatory because they determine outcome, not procedures, of election).

Because lifetime legislative term limits impose a content-based restriction on the eligibility of candidates for legislative office and because they permanently restrict Plaintiffs' ability to vote for their preferred candidates, the Court finds that the legislative term limits provisions of the California Constitution impose a severe burden on Plaintiffs' First and Fourteenth Amendment rights of voting, expression, and association.

C. Importance of the State's Interests in Term Limits

After considering "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," the Court must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule." *Anderson*, 460 U.S. at 789. The Court must also "consider the extent to which those interests make it necessary to burden [Plaintiffs'] rights." *Id.* The State has identified two general categories of interests that are served by term limits. First, it argues that States have a sovereign right to restructure their political processes and to define the qualifications for important State offices. Second, it contends that term limits advance a variety of interests related to enhancing political accountability and representation.

1. State Sovereignty

a. *Gregory v. Ashcroft* and the Political Function Cases

The State argues that the Tenth Amendment and principles of federalism protect its prerogative to determine the structure of government and the qualifications of its officers. The principal case on which the State relies is *Gregory v. Ashcroft*, 501 U.S. 452 (1991). In *Gregory*, the petitioners challenged the legality of a provision of the Missouri Constitution requiring State judges to retire upon reaching the age of seventy. They argued that the mandatory retirement provision violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and the Equal Protection Clause. The Supreme Court, noting the importance of a State's ability to prescribe the qualifications for holding State offices, crafted a "plain statement" rule. Under this rule, the Court would not construe federal employment laws to apply to important State offices absent an unambiguous statement of statutory intent. *Gregory*, 501 U.S. at 468-70. The Court held that the ADEA does not unambiguously apply to State judges; therefore, mandatory retirement provisions for State judges do not violate the ADEA. *Id.* at 470. Significantly, the Court did not hold that Congress could not pass legislation governing qualifications for holding important State offices. It simply held that, in the case of the ADEA, Congress had not legislated the retirement age of State judges.[13]

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[13] The Court also reiterated that age is not a suspect classification. Applying rational basis review, it held that the mandatory retirement provision did not violate the Equal Protection Clause. *Id.* at 473.

While discussing the significance of a State's ability to define the qualifications for holding important State offices, the Supreme Court observed that,

> Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. 'It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.'

Id. at 460 (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900)). *See also Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) ("The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference."). Although *Gregory* noted that the federal Constitution does place some limits on the power of State governments to define the qualifications for State office, it also pointed out that the "Court has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers. Rather, the Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment." *Id.* at 469.

Gregory identified the "political function" cases as examples of Fourteenth Amendment cases in which the Supreme Court deferentially reviewed States' power to define the qualifications for holding State office. These

cases provide that laws excluding non-citizens from important governmental positions are subject to less rigorous scrutiny than laws that make classifications on the basis of alienage usually receive. *Id.* at 463 (citing *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)). In *Sugarman v. Dougall*, the Court declined to apply strict scrutiny to laws prohibiting noncitizens from holding offices that serve a political function because of the States' interest in preserving " 'the basic conception of a political community.' " 413 U.S. 634, 647 (1973) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)). Because the Court viewed non-citizens as falling outside the political community, States were justified in excluding non-citizens from positions intimately related to the life of the political community.

The political function cases upon which the *Gregory* Court relied for its observation are of little relevance to term limits. The Supreme Court's analysis in the political function cases turned on the ability of communities to restrict certain politically sensitive jobs to members of the political community. Term limits, in contrast, burden the ability of voters and candidates, the defining elements of the political community, to participate on an equal basis in the electoral process.

Gregory does establish that States have a substantial interest in defining the qualifications for important State offices, but it is not dispositive in the context of term limits. *Gregory* observed that federalism sometimes limits the force of the Fourteenth Amendment, but, with the exception of the political function cases, it did not specify when federalism concerns override normal Fourteenth Amendment standards. Indeed, the Supreme Court has recently clarified that *Gregory* does not stand for the

proposition that States may disregard basic constitutional protections when establishing the conditions of candidacy for State office. *Chandler v. Miller*, No. 96-126, 1997 WL 176382, at *8 (S. Ct. Apr. 16, 1997). Term limits implicate not only the Fourteenth Amendment, but also the First Amendment. *Gregory*, however, did not suggest that federalism concerns can override the strictures of the First Amendment. *See Chandler*, 1997 WL 176382, at *8 (State's power to establish qualifications for State offices does not diminish the constraints on State action imposed by the Fourth Amendment). Finally, as explained below, the Supreme Court has been especially rigorous in its application of the Fourteenth Amendment when the right to vote is at stake. *Gregory* did not involve voting rights.

b. Voting Rights Cases

The voting rights cases establish that the Fourteenth Amendment limits States' leeway in determining the basis for political representation. In *Baker v. Carr*, the Supreme Court held that the manner in which a State apportions legislative representation presents a justiciable controversy. 369 U.S. 186, 232 (1962). The Court observed that "the presence of a matter affecting State government does not render the case nonjusticiable." *Id.* In subsequent decisions, the Court held that State legislatures must be elected according to the principle of one person, one vote. *See, e.g., Reynolds*, 377 U.S. at 568; *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736 (1964).

These decisions struck at the heart of States' ability to decide how to structure their electoral systems. *See Baker*, 369 U.S. at 334 (Harlan, J., dissenting). Moreover, the

decisions held State governments to a different standard than the federal government. State senate districts, for example, were required to be determined on the basis of population, not political subdivision. *Reynolds*, 377 U.S. at 568. The Court explicitly rejected the argument that counties could serve as the basis for representation in State senates just as States are the basis for representation in the United States Senate. *Id.* at 573-75. The Court also rejected systems for the election of Statewide officers that were explicitly patterned after the Electoral College. *Gray v. Sanders*, 372 U.S. 368, 377-80 (1963).

The Fourteenth Amendment, then, was applied to overturn basic structures integral to State government, structures that had been in place for decades and that had direct federal analogies. The Supreme Court justified its far-reaching actions by pointing to the importance of providing all voters an equal basis for participating in the electoral process. That term limits reflect a basic decision by the State about what the character of the State legislature should be, therefore, does not establish that those decisions must necessarily survive constitutional review or that they should be subject to a more deferential standard of review. This is especially true given the manner in which term limits restrict Plaintiffs' voting rights.

c. State Sovereignty and Narrow Tailoring

Anderson and *Burdick* instruct courts to consider whether the means chosen by the State is narrowly tailored to accomplish the State's asserted interest. Insofar as sovereignty consists of the exercise of discretion, it is anomalous to ask whether a particular means chosen by

the State is narrowly tailored to serve the State's interest in exercising its sovereignty. The State's sovereign interest, however, cannot be sufficient by itself to establish the constitutionality of political reforms. Otherwise, any political decision by the State could escape constitutional scrutiny. Because of the severity of the burden lifetime legislative term limits impose on voters' First and Fourteenth Amendment rights, the State must identify other interests that are advanced by term limits. The State's sovereign interest in shaping its own political institutions and defining the qualifications for holding high political office, however, lends significance to the State's other interests.

2. Political Accountability and Representation

The State asserts six interests related to enhancing political accountability and representation: ending political careerism, overcoming incumbent advantages, increasing electoral competition, encouraging qualified candidates to run for office, and reinstating rotation, a "central tenet of republican government." Many of these interests, however, rest on the State's assumption that legislators had become invulnerable to the normal means of insuring political accountability during the 1980s.

a. Legislative Turnover

The State has not proven its factual assertions that legislators attained unprecedented job security during the 1980s and had become invulnerable and insensitive to

less drastic measures designed to insure political accountability. The State's expert testified that the rate of turnover in the legislature declined noticeably between the 1970s and 1980s. Tr. 553 (Petracca), Tr. Ex. 69. He attributed increased turnover during the early 1990s to anticipation of the implementation of term limits in 1996. Tr. 569. Plaintiffs' expert, however, demonstrated that the relatively high turnover rates during the 1970s and the relatively low turnover rates during the 1980s were part of a cyclical pattern in legislative turnover that has prevailed since the end of the Second World War. Tr. 345-50 (Jacobson), Tr. Exs. 32-38. It is thus inaccurate to describe the 1980s as a decade of unprecedented low rates of turnover.

The State also failed to establish that term limits were necessary to break the pattern of low legislative turnover that some perceived as emerging during the 1980s. Although legislative turnover in California increased following the approval of Proposition 140, turnover also increased in the United States House of Representatives, which was not affected by term limits. Tr. 358-62 (Jacobson), Tr. Ex. 38. Plaintiffs attribute increased turnover during the early 1990s in both the California legislature and the House of Representatives to a variety of factors: legislative reapportionment, a spate of scandals, and national political trends. Tr. 359. A similar combination of influences was also responsible for relatively high rates of turnover during the 1970s. Tr. 352. Even assuming that low rates of legislative turnover are undesirable and that turnover declined to an unprecedented low during the 1980s, then, the State has failed to establish that term limits were necessary to rectify the low turnover rates of the 1980s.

b. The State's Interests

i. Political Careerism

The preamble to Proposition 140 declared political careerism to be one of the problems afflicting California politics. Cal. Const. art. IV, § 1.5. Legislative term limits do not prevent people from making careers as politicians. They limit the amount of time that individuals may serve in the legislature, but they do not prevent legislators from running for other political offices, nor do they prevent individuals who have spent a lifetime in other political offices from running for the legislature.

Term limits do prevent individuals from pursuing careers as State legislators, but the State has not established that its interest in preventing people from pursuing careers in the legislature is important enough to justify the burden that term limits impose on voting rights. The State contends that professional politicians become socialized in a culture of government and therefore become distant from and unresponsive to their constituents. Tr. 536 (Petracca). Non-professional legislators, the State maintains, will introduce fresh ideas into the legislative process, be less motivated by concerns for their careers, and more responsive to constituents' concerns. Tr. 537.

Concern for their own careers, however, motivates those who hope to pursue a legislative career to be responsive to constituents. Re-election is a powerful incentive for legislators to be attentive to constituents' needs and priorities. Tr. 82-83 (Fiorina); 342-44 (Jacobson). Voters have the ability to elect someone else if their

legislator ceases to represent their interests or their views.

Term limits reflect an ideological preference for "citizen" or amateur legislators. The State has a legitimate interest in allowing voters to express their preference for amateur legislators, but it does not have a legitimate interest in preventing other voters from expressing their ideological preference for career or professional legislators. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

The State has therefore failed to establish that the pursuit of legislative careers, by itself, impedes effective representation or electoral competition. Ending legislative careerism, therefore, is not a substantial or compelling State interest.

ii. Advantages of Incumbency

The strongest interest articulated by the State is the State's interest in reducing the advantages that incumbents enjoy over rival candidates simply because they are incumbents. Incumbency confers a variety of advantages on legislators. Some of these advantages are inherent in the position; others generally accompany incumbency but can be restricted or eliminated. Some advantages are the fair rewards of desirable behavior; others may be unfair and undeserved.

Inherent advantages of incumbency include visibility, public recognition, and gratitude for services rendered. Visibility and recognition facilitate communications between legislators and their constituents and permit the public to monitor their political representatives. Tr. 71 (Fiorina). The gratitude that legislators earn by representing the political interests of their constituents is itself an important incentive for legislators to remain attentive to voters. To the extent that term limits diminish the value of visibility and gratitude, they may make legislators less sensitive to the priorities of their constituents. Tr. 84. The State has therefore failed to establish that it has a significant interest in eliminating these inherent advantages of incumbency.

Other advantages of incumbency, however, are less desirable in the legislative process. Among the most significant of these advantages are fundraising ability, the perquisites of office, and control over legislative redistricting. Tr. 73-75. The State does have a compelling interest in limiting these advantages because they hinder political accountability and discourage political opposition.

Although term limits are one way to eliminate these advantages, the State did not establish that other, less constitutionally intrusive reforms, would be less effective than term limits. Perquisites of office can be, and to an extent already have been, restricted by initiative or by normal legislation. Control over legislative redistricting can be assigned to a nonpartisan body, as occurred following the 1990 census. Public financing of legislative

campaigns could reduce the significance of political fundraising.[14]

Even if the State had established that nothing short of a ban on incumbents from seeking re-election could overcome the unfair advantages of incumbency, it has not established that this ban must be permanent. Some advantages of incumbency, such as the perquisites of office, vanish as soon as an incumbent leaves office. Others, such as recognition and gratitude, fade over time. Professor Jacobson studied the success of former members of Congress who ran for re-election after being out of office. Most of these former congress members ran for re-election within four years of leaving office. He found that former congress members are no more likely to be elected than other candidates who have prior political experience. Tr. 379.

Although the State does have a compelling interest in limiting the undesirable advantages of incumbency, other reforms that do not raise significant constitutional problems would also advance the State's interest. Lifetime

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[14] The State argues that public financing of campaigns is not a realistic alternative to term limits and therefore does not establish that term limits are an overbroad solution to incumbent advantages. The California electorate's past refusal to adopt reforms that are narrowly tailored to redress incumbent advantages in fundraising, however, cannot shield term limits from constitutional scrutiny. The State's argument is tantamount to saying that popular but unconstitutional solutions to serious problems should survive judicial scrutiny if narrowly tailored, constitutional solutions to those problems are unpopular.

term limits, therefore, are not narrowly tailored to accomplish the State's interest in diminishing the undesirable advantages of incumbency.

iii. Electoral Competition

The State argues that term limits advance its interest in promoting electoral competition. Incumbents generally do not face serious challenges in primary elections and often escape serious challenges in general elections as well. *See* Tr. Ex. 69. In addition, larger numbers of candidates run for open seats than for seats held by incumbents seeking re-election, and the margin of victory in contests for open seats tends to be closer. Tr. 560-67 (Petracca). Because term limits will periodically create open seats, the State contends, more electoral competition will result.

As used by the State, the term electoral competition refers to increasing the number of candidates running for office and decreasing the margins by which candidates win elections. Neither of these interests, by themselves, are compelling interests because it is not self-evident that they have a desirable effect on government. The State's argument is tantamount to saying that electoral competition will be improved by eliminating the strongest competitors from the field. The State argues, however, that intensifying electoral competition is a compelling State interest because it will have the effect of increasing the opportunity for the electorate to make judgments about party platforms and promoting clearly defined debate about public policy choices. Tr. 571-77.

By periodically preventing incumbents from running for reelection, term limits may help focus debate on the political stances of the candidates and their parties rather than on how well the incumbent has represented the district. Although the State has a legitimate interest in encouraging debate about public policy, for the State to promote a favored form of political discourse by preventing voters from voting for a disfavored category of candidates raises serious First Amendment and voting rights concerns. *See Buckley*, 424 U.S. at 48-49. The State, therefore, cannot justify term limits on the grounds that they encourage certain forms of political debate.

The State's argument overlooks one of the main purposes of electoral competition: promoting electoral accountability. The threat of electoral competition encourages incumbents to be attentive to their constituents' needs and to represent their interests vigorously. Tr. 82 (Fiorina). That incumbents often face weak challengers in elections does not necessarily indicate that they are unaccountable to their constituents. It may indicate that they are forestalling serious opposition by representing their districts in a manner their constituents support.

Indeed, term limits may undermine electoral accountability by reducing incentives for legislators to represent their districts. Tr. 84 (Fiorina); 384 (Jacobson). It takes a major investment of time and effort to become familiar with a legislative district. The possibility of re-election is a strong incentive for legislators to make this investment. Term limits diminish the incentive for undertaking this work because legislators can no longer look forward to the possibility that their hard work will yield political dividends in subsequent elections. Tr. 391-92 (Jacobson).

Even if the State had established that increasing the number of candidates running for office and decreasing the margin by which candidates win elections were compelling interests, it has not established that lifetime term limits are narrowly tailored to accomplishing these interests. Limiting the number of consecutive terms that legislators may serve would also periodically create open-seat elections.

The State, therefore, has failed to establish either that increasing the number of candidates running for office and decreasing the margin by which candidates win elections are compelling interests or that lifetime term limits are narrowly tailored to accomplishing these goals.

iv. Encouraging Qualified Candidates

The State also argues that term limits will encourage more and better qualified candidates to run for legislative office. Because term limits will create more open seats than otherwise would have occurred, it is probably true that term limits will encourage more people to run for the legislature. There is no evidence that those candidates will be more qualified. It is incongruous to argue that term limits will encourage better candidates to run for office while at the same time preventing popular candidates from running for re-election.

Although it is legitimate for the State to create conditions that will encourage more individuals to run for legislative office, for the State to encourage some candidates by forbidding others from running raises serious First Amendment concerns. *See Buckley*, 424 U.S. at 48-49.

The encouragement that term limits provide to qualified candidates who would not otherwise run for the legislature, therefore, does not constitute a compelling State interest. Neither is the lifetime ban narrowly tailored to achieve this result.

v. Representativeness of Legislature

The State also contends that term limits will make the legislature more representative. The State's expert, Professor Petracca, argued that term limits make the legislature more demographically and ideologically representative. Tr. 586.

The evidence is mixed concerning the effects of term limits on demographic representation within the legislature. Term limits probably will increase the number of women in the legislature in the short term. In elections for open seats to the legislature, male and female candidates fare equally well. Incumbents, however, enjoy an advantage over challengers. Because incumbents have been disproportionately male, it is logical to conclude that term limits will accelerate the rate at which women become legislators. Tr. 589 (Petracca); Tr. 395 (Jacobson). This will be a short-term phenomenon, however.

It is not clear that term limits will make the legislature more representative of other demographic groups. Legislative reapportionment has been the predominant factor behind the increasing representation of ethnic minorities. Tr. 394 (Jacobson). It is doubtful that term limits alone will produce more candidates from less affluent sectors of society. Tr. 393. Term limits may encourage

more candidates with background in business, although this is disputed. Tr. 593 (Petracca); Tr. Ex. 69, table 14.

The effects of term limits on the demographic composition of the legislature, thus, are speculative. Speculation about the possible effects of term limits cannot justify the severe burdens imposed on the ability of voters to vote for candidates of their choice. Even if the State's argument that term limits will make the legislature more demographically representative were not speculative, the State has not established that lifetime term limits will be more effective at achieving this goal than limits on consecutive terms.

The State also argued that term limits will make the legislature more ideologically representative. Term limits will accomplish this, according to the State, because political debate will focus less on the incumbent's ability to provide constituent services than on candidates' political stances. Tr. 595-96 (Petracca). The First Amendment, however, prohibits the State from restricting expressive activity in order to promote favored forms of political discourse. Therefore, the State cannot justify term limits on the ground that preventing voters from voting for certain candidates will result in a more elevated form of political debate.

vi. Rotation

The State also maintains that "term limits reinstate rotation, a central tenet of republican government." By equating term limits with the eighteenth- and nineteenth-century practice of rotation of office, the State seeks to

establish that term limits are a legitimate innovation with deep roots in American history. The State also attempts to establish that term limits are entirely consistent with principles of republican self-government.

Term limits resemble the historical practice of rotation to the extent that both prevent prolonged, uninterrupted legislative service. As explained above, however, California's extreme version of term limits is quite different from rotation in that it imposes a lifetime cap on legislative service. The State also exaggerates the centrality of rotation to early American political philosophy. It was a widespread practice, but few States imposed rotation as a formal requirement. The Constitutional Convention considered and rejected proposals to require rotation. *See U.S. Term Limits*, 115 S. Ct. at 1859-60.

That rotation was a widespread practice in the eighteenth and nineteenth centuries, however, does not establish that California has a compelling or important interest in reinstating rotation and converting it into a lifetime ban. In addition, most of the evidence the State presented concerning rotation antedates the ratification of the Fourteenth Amendment. All of it precedes important Supreme Court decisions concerning voting rights and ballot access. Instituting a form of rotation, therefore, does not constitute a significant State interest.

D. Lifetime Term Limits and Narrow Tailoring

As explained above, lifetime term limits are not narrowly tailored to achieve the goals articulated by the State. Indeed, the State's own expert testified that he prefers a limit on the number of consecutive terms that

legislators may serve to lifetime term limits. He believes that lifetime term limits squander valuable legislative experience. Tr. 687. The most obvious method of making California's version of term limits more narrowly tailored would be to convert it into a limit on the number of consecutive terms that legislators may serve.[15]

The State contends, however, that consecutive term limits would not achieve its goals for several reasons. The most significant of these reasons are placeholding legislators and the creation of a revolving door between the legislature and lobbying firms. Tr. 619; *see also Eu*, 54 Cal. 3d at 523. The State fears that term-limited legislators will make deals with their successors whereby their successors would agree to step aside once their predecessors become eligible for office again. Although it is conceivable that such deals might occasionally be made, such speculation is insufficient to justify permanently restricting voters' choice of candidates. The danger that legislators will leave office to work in lobbying firms only to return to the legislature a few years later can be limited by legislation.

The Court therefore rejects the State's contention that consecutive term limits would create problems which are serious enough to justify the imposition of lifetime term limits.

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[15] The Court expresses no opinion on the constitutionality of any form of term limits other than the lifetime legislative term limits imposed by Proposition 140.

E. Summary

Two of the interests asserted by the State are compelling: its sovereignty interest in defining its own political institutions and its interest in reducing the unfair electoral advantages incumbents enjoy. The State's other interests do not stand up to close examination.

The lifetime legislative term limits provisions of the California Constitution are not narrowly tailored to serve the State's compelling interests. The State's sovereign interest in reforming its political institutions is not sufficient, by itself, to justify measures which burden rights protected by the First and Fourteenth Amendments. California's version of lifetime term limits is not narrowly tailored to reduce the electoral advantages of incumbency. A variety of targeted reforms could redress the most troublesome advantages of incumbency. Less drastic versions of term limits would also be effective at significantly reducing the undesirable advantages of incumbency.

CONCLUSION

The lifetime term limits on State legislative offices enacted by Proposition 140 impose a severe burden on Plaintiffs' First and Fourteenth Amendment rights of voting and association. The State has not established that lifetime term limits are narrowly tailored to serve a compelling State interest.

The Court therefore

1. DECLARES that the lifetime term limits provisions contained in section 2(a) of article IV of the

California Constitution violate the United States Constitution;

2. ENJOINS Defendants Clark and McCormack from enforcing the lifetime term limits provisions contained in section 2(a) of article IV of the California Constitution against Plaintiffs and to accept the declarations of intention to be a candidate and the nomination papers when tendered by Plaintiffs Bates, Friedman, or Escutia; and

3. ENJOINS Defendant Jones from enforcing the lifetime term limits provisions contained in section 2(a) of article IV of the California Constitution against Plaintiffs, to accept and process the declarations of intention to be a candidate and the nomination documents of Plaintiffs Bates, Friedman, or Escutia, to certify Plaintiff legislators' eligibility to be candidates (if all other requirements are met), and to certify the elections results if Plaintiff legislators win the election.

STAY PENDING APPEAL

Under Federal Rule of Civil Procedure 62(c), the Court has discretion to stay an injunction during the pendency of an appeal. The standard for granting a stay is the same as the standard for granting a preliminary injunction: a showing of " 'either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply' " in favor of the party subject to the injunction. *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988) (quoting *Los Angeles Memorial Coliseum Comm'n v. National Football*

League, 634 F.2d 1197, 1201 (9th Cir. 1980)). The constitutionality of legislative term limits is an issue of first impression in the Ninth Circuit. The State has raised serious questions concerning the constitutionality of term limits. The balance of hardships involved in enforcing the injunction before these questions are finally decided tips sharply in the State's favor. Enjoining enforcement of term limits prior to appellate review may throw the State's electoral process into confusion. Staying the injunction may effectively deny Plaintiffs the opportunity to seek re-election to the Assembly in 1998, but, should the judgment of the Court be affirmed on appeal, it will not permanently deny Plaintiffs the opportunity to seek election to the Assembly. The Court therefore STAYS the injunction granted in this order for thirty days and, if the State files an appeal, during the pendency of the appeal to the Ninth Circuit Court of Appeals.

IT IS SO ORDERED.

Dated: APR 23 1997

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TOM BATES; EDWARD H. LYMAN; RICHARD STERLING; ARDIS GRAHAM; RICHARD D. LEWIS; LAWRENCE J. BUCHALTER; JONATHAN BROWNING; RACHEL SHERMAN; MARTHA M. ESCUTIA; SYLVIA HERNANDEZ; ANA ROSA PENA; CLAUDIA NAVAR; BARBARA J. FRIEDMAN; SUSAN ZARAKOV; and HARRIET SCULLEY,

Plaintiffs,

v.

BILL JONES, Secretary of State of the State of California; BRADLEY J. CLARK, Alameda County Registrar of Voters; and CONNY McCORMACK, Los Angeles County Registrar of Voters,

Defendants.

PETER F. SCHABARUM and LEWIS K. UHLER,

Intervenors.

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No. C 95-02638 CW

ORDER ON DEFENDANTS' EXPEDITED MOTIONS (1) TO AMEND THE JUDGMENT AND/OR FOR SUPPLEMENTAL FINDINGS AND (2) TO EXTEND STAY OF INJUNCTION

(Filed May 8, 1997)

Defendants have filed post-trial Expedited Motions (1) to Amend Judgment and/or for Supplemental Findings, and (2) to Extend Stay of Injunction. The matter was submitted on the papers filed by the parties, the trial record, and previously filed points and authorities relating to the issues of res judicata and standing.

The Court hereby adds the following findings of fact to its findings of fact and conclusions of law filed on April 23, 1997.

None of the Plaintiffs in this matter was a party to *Legislature v. Eu*, 54 Cal. 3d 492 (1991), or exercised control over that litigation. Based upon the testimony of Plaintiffs Bates, Escutia, and Friedman, the voter Plaintiffs, and Michael Galizio, the Court finds that none of the Plaintiffs in this suit is or was in privity with the plaintiffs in *Eu*. The plaintiffs in *Eu* represented the California Legislature's institutional interests rather than the interests of its members or constituents. They subordinated the interests of voters and candidates to their concern for other aspects of Proposition 140 not at issue here. Plaintiffs here, therefore, are not precluded from pursuing the instant lawsuit.

Because the Court finds that Bates was not in privity with the plaintiffs in *Eu*, it need not address Defendants' argument that the voter Plaintiffs from Bates' former district would lack standing if Bates were precluded by res judicata.

Additional factual findings and the Court's conclusions of law with respect to res judicata and standing are contained in its Order Denying Motions to Dismiss and for Preliminary Injunction, dated October 19, 1995, and

its Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiffs' Motion for Leave to Amend, dated May 30, 1996.

It is hereby ordered that Defendants' post-trial motion to amend the judgment is DENIED. The Court STAYS the injunction granted in its April 23, 1997 Order for thirty days from the date of the filing of this Order and, if the State files an appeal, during the pendency of the appeal to the Ninth Circuit Court of Appeals.

IT IS SO ORDERED.

Dated: MAY 8, 1997

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

APPENDIX E

140 Limits on Terms of Office, Legislators' Retirement, Legislative Operating Costs. Initiative Constitutional Amendment

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Official Title and Summary:

LIMITS ON TERMS OF OFFICE, LEGISLATORS' RETIREMENT, LEGISLATIVE OPERATING COSTS. INITIATIVE CONSTITUTIONAL AMENDMENT

- Persons elected or appointed after November 5, 1990, holding offices of Governor, Lieutenant Governor, Attorney General, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Board of Equalization members, and State Senators, limited to two terms; members of the Assembly limited to three terms.

- Requires legislators elected or serving after November 1, 1990, to participate in federal Social Security program; precludes accrual of other pension and retirement benefits resulting from legislative service, except vested rights.

- Limits expenditures of Legislature for compensation and operating costs and equipment, to specified amount.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- The limitation on terms will have no fiscal effect.

- The restrictions on the legislative retirement benefits would reduce state costs by approximately $750,000 a year.

- To the extent that future legislators do not participate in the federal Social Security system, there would be unknown future savings to the state.
- Legislative expenditures in 1991-92 would be reduced by about 38 percent, or $70 million.
- In subsequent years, the measure would limit growth in these expenditures to the changes in the state's appropriations limit.

Analysis by the Legislative Analyst

Background

There are 132 elected state officials in California. This includes 120 legislators and 12 other state officials, including the Governor, Lieutenant Governor, and Attorney General. Currently, there is no limit on the number of terms that these officials can serve. Proposition 112, passed by the voters in June 1990, requires the annual salaries and benefits (excluding retirement) of these state officials to be set by a commission. Most of these officials participate in the federal Social Security system, and all have the option of participating in the Legislators' Retirement System. The vast majority of the 132 elected state officials participate in this retirement system. The system is supported by contributions from participating officials and the state.

Funding for the Legislature and its employees is included in the annual state budget. Before it becomes law, the budget must be approved by a two-thirds vote of the membership of both houses of the Legislature and must be signed by the Governor.

Proposal

This initiative makes three major changes to the California Constitution. First, it limits the number of terms that an elected state official can serve in the *same office* (the new office of Insurance Commissioner is not affected by this measure). Second, it prohibits legislators from earning state retirement benefits from their future service in the Legislature. Third, it limits the total amount of expenditures by the Legislature for salaries and operating expenses.

The specific provisions of this measure are:

Limits on the Terms of Elected State Officials

- The following state elected officials would be limited to no more than two four-year terms in the same office: Governor, Lieutenant Governor, Attorney General, Controller, Secretary of State, Superintendent of Public Instruction, Treasurer, members of the Board of Equalization, and State Senators.

- Members of the State Assembly would be limited to no more than three two-year terms in the same office.

- These limits apply to a state official who is elected on or after November 6, 1990. However, State Senators whose offices are *not* on the November 1990 ballot may serve only one additional term.

Restrictions on Legislative Retirement Benefits

- This measure prohibits current and future legislators from earning state retirement benefits from their service in the Legislature on or after November 7, 1990. This restriction would not eliminate retirement benefits earned prior to that time.

- This measure requires a legislator serving in the Legislature on or after November 7, 1990 to participate in the federal Social Security system. (However, federal law may permit only current legislators who are presently participating in the federal Social Security system to continue to participate in the system. It may also prohibit future legislators from participating in the federal Society [sic] Security system.)
- This measure does not change the Social Security coverage or the state retirement benefits of other state elected officials such as the Governor, Lieutenant Governor, and Attorney General.

Limits on Expenditures by the Legislature

- This measure limits the total amount of expenditures by the Legislature for salaries and operating expenses, beginning in the 1991-92 fiscal year.
- In 1991-92, these expenditures are limited to the *lower* of two amounts: (1) a total of $950,000 per Member or (2) 80 percent of the total amount of money expended in the previous year for these purposes. In future years, the measure limits expenditure growth to an amount equal to the percentage change in the state's appropriations limit.

Fiscal Effect

Limits on the Terms of Elected State Officials. This provision would not have any fiscal effect.

Restrictions on Legislative Retirement Benefits. The provision which prohibits current and future Members of the Legislature from earning state retirement benefits from legislative service on and after November 7, 1990 would reduce state costs by about $750,000 a year.

To the extent that future legislators do not participate in the federal Social Security system, the measure would result in unknown future savings to the state.

Limits on Expenditures by the Legislature. In 1991-92, expenditures by the Legislature would be reduced by about 38 percent, or $70 million. In subsequent years, this measure would limit growth in these expenditures to the change in the state's appropriations limit.

Argument in Favor of Proposition 140

Proposition 140 will for the first time ever place a limit on the number of terms a State official may serve in office.

A Yes Vote on Proposition 140 will reform a political system that has created a legislature of career politicians in California. It is a system that has given a tiny elite (only 120 people out of 30 million) almost limitless power over the lives of California's taxpayers and consumers.

Proposition 140, will limit State Senators to two terms (8 years); will limit Assembly members to three terms (6 years); and limit the Governor and other elected constitutional officers to two terms (8 years).

By reducing the amount they can spend on their personal office expenses, Proposition 140, will cut back on the 3,000 political staffers who serve the legislature in Sacramento. In the first year alone, according to the legislative analyst, it will save taxpayers $60 million.

Proposition 140, will end extravagant pensions for legislators. While most Californians have to depend on

Social Security and their own savings, the legislative pension system often pays more than the legislator received while in office. In fact 50 former officials receive $2,000.00 per month or more from the Legislative retirement fund.

Limiting Terms, will create more competitive elections, so good legislators will always have the opportunity to move up the ladder. Term limitation will end the ingrown, political nature of both houses – to the benefit of every man, woman and child in California.

Proposition 140, will remove the grip that vested interests have over the legislature and remove the huge political slush funds at the disposal of Senate and Assembly leaders.

Proposition 140 will put an end to the life-time legislators, who have developed cozy relationships with special interests. We all remember the saying, "Power corrupts and absolute power corrupts absolutely." But limit the terms of Legislative members, remove the Speaker's cronies, and we will also put an end to the Sacramento web of special favors and patronage.

Proposition 140 will end the reign of the Legislature's powerful officers – the Assembly Speaker (first elected a quarter of a century ago) and the Senate Leader (now into his third decade in the Legislature). Lobbyists and power brokers pay homage to these legislative dictators, for they control the fate of bills, parcel out money to the camp followers and hangers-on, and pull strings behind the scenes to decide election outcomes.

Incumbent legislators seldom lose. In the 1988 election, 100% of incumbent state senators and 96% of incumbent members of the assembly were re-elected. The British House of Lords – even the Soviet Legislature – has a higher turnover rate. Enough is Enough! It's time to put an end to a system that makes incumbents a special class of citizen and pays them a guaranteed annual wage from first election to the grave. Let's restore that form of government envisioned by our Founding Fathers – a government of citizens representing their fellow citizens.

VOTE YES ON PROPOSITION 140 TO *LIMIT STATE OFFICIALS TERM OF OFFICE!*

PETER F. SCHABARUM
Chairman, Los Angeles County Board of Supervisors

LEWIS K. UHLER
President, National Tax-Limitation Committee

J.G. FORD, JR.
President, Marin United Taxpayers Association

Rebuttal to Argument in Favor of Proposition 140

Proposition 140 is a proposal by a downtown Los Angeles politician to take away your right to choose your legislators. He has a history of taking away voting rights. He and two political cronies voted to spend $500,000.00 in tax dollars to hire a personal lawyer to defend him against Voting Rights Act violations in Federal Court. Newspapers call it an "outrageous back room deal."

His "Big Bucks" friends, including high-priced lobbyists, have lined his pockets with campaign contributions to help control who *you* can vote for.

- IF 140 PASSES, LOBBYISTS COULD SUBSTITUTE THEIR OWN PAID EMPLOYEES FOR THE INDEPENDENT STAFF RESEARCHERS OF THE LEGISLATURE ELIMINATED BY THIS MEASURE.
- 140 MISLEADS YOU ABOUT THE SO-CALLED "HIGH" COST OF THE LEGISLATURE – THE COST IS LESS THAN 1/2 PENNY PER TAX DOLLAR.
- THE BIGGEST LIE IS THE FACT THEY DON'T TELL YOU THAT 140 IS A *LIFETIME BAN*.

This is a blatant power grab by Los Angeles contributors and lobbyists who have been wining and dining "Mr. Downtown Los Angeles" in government for SEVEN TERMS – OVER TWENTY YEARS.

Practice what you preach, "Mr. Downtown Los Angeles," Peter Schabarum. Cut *your own* budget and limit *your own* terms. Don't be piggy and take away people's rights after you have fully eaten at the table.

There is no need for 140. The vast majority of the Legislature *already* serves less than 10 years.

That's *your* choice.

Keep it.

Stop Downtown Los Angeles' power grab.

Vote no on 140!

ED FOGLIA
President, California Teachers Association

DAN TERRY
President, California Professional Firefighters

LINDA M. TANGREN
State Chair, California National Women's Political Caucus

Argument Against Proposition 140

Proposition 140 claims to mandate term limits. But in fact, it limits our voting rights.

This measure takes away the cherished constitutional right to freely cast a ballot for candidates of our choice.

We are asked to forfeit *our* right to decide who *our* individual representatives will be.

PROPOSITION 140'S LIFETIME BAN

140 does *not* limit *consecutive* terms of office. Instead 140 says:

- After serving six years in the Assembly, individuals will be constitutionally *banned for life* from ever serving in the Assembly.
- After serving eight years in the Senate, individuals will be constitutionally *banned for life* from ever serving in the Senate.
- Similar lifetime bans will be imposed on the Superintendent of Public Instruction and other statewide offices.

There are no exceptions – not for merit, not for statewide emergencies, not for the overwhelming will of the people.

Once banned, always banned.

PROPOSITION 140 IS UNFAIR

It treats everyone – good and bad, competent and incompetent – the same.

No matter how good a job someone does in office, they will be *banned for life.*

No matter what cause they may be fighting for or how badly we, the people, want to reelect them, they will be *banned for life.*

You won't even be able to write-in their names on your ballot. If you do, your vote won't count.

That's just not fair.

LIMITS OUR RIGHT TO CHOOSE

The backers of 140 don't trust us, the people, to choose our elected officials. So instead of promoting thoughtful reforms that help us weed out bad legislators, that impose a lifetime ban that eliminates good legislators and bad ones alike at the expense of our constitutional rights.

No eligible citizen should be *permanently banned* for life from seeking any office in a free society. And we should not be *permanently banned* from voting freely for the candidate of our choice.

Resist the rhetoric. Proposition 140 is not about restricting the powers of incumbency. It's about taking away our powers to choose.

PHONY PENSION REFORM

Proposition 140's retirement provisions also are misdirected and counterproductive.

140 does not eliminate the real abuses: double and triple dipping – the practice of taking multiple pensions.

Instead it raises new barriers to public office by banning our future representatives from earning *any* retirement except their current social security.

140's retirement ban won't hurt rich candidates. It will hurt qualified, ordinary citizens who are not rich and have to work hard to provide economic security for themselves and their families.

PROPOSITION 140 GOES TOO FAR

It upsets our system of constitutional checks and balances, forcing our representatives to become even more dependent on entrenched bureaucrats and shrewd lobbyists.

If its proponents were sincere about political reform, they wouldn't have cluttered it with so many unworkable provisions.

VOTE NO ON PROPOSITION 140

STOP THIS RADICAL AND DANGEROUS SCHEME! PROTECT OUR CONSTITUTIONAL RIGHTS. VOTE NO ON PROPOSITION 140'S LIFETIME BAN.

DR. REGENE L. MITCHELL
President, Consumer Federation of California

LUCY BLAKE
Executive Director, California League of Conservation Voters

DAN TERRY
President, California Professional Firefighters

Rebuttal to Argument Against Proposition 140

Proposition 140 restores *true* democracy, gives you *real* choices of candidates, protects *your* rights to be represented by someone who knows and cares about *your* wishes. It opens up the political system so *everyone* – not just the entrenched career politicians – can participate.

Proposition 140 will bring new ideas, workable policies and fresh cleansing air to Sacramento. All are needed badly. A stench of greed, and vote-selling hangs over Sacramento because lifetime-in-office incumbents think it's *their* government, not yours.

Californians polled by the state's largest newspaper say "most politicians are for sale," and "taking bribes is a relatively common practice" among lawmakers. Proposition 140 cuts the ties between corrupting special interest money and long-term legislators.

Why don't more people vote? Because incumbents have rigged the system in their favor so much, elections are meaningless. Even the worst of legislators get reelected 98% of the time. Honest, ethical, *truly* representative people who want to run for office don't stand a chance.

Do career legislators *really* earn their guaranteed salaries, extravagant pensions, limousines, air travel and

other luxury benefits? No. They use *your* money and *your* government to buy themselves power and guaranteed reelections.

Who really opposes Proposition 140? It isn't ordinary people who have to work for a living. It's incumbent legislators and their camp followers. Beware of movie stars and celebrities in million-dollar TV ads, attacking proposition 140. They're doing the dirty work for career politicians.

VOTE "YES!" ON PROPOSITION 140. ENOUGH, IS ENOUGH!

W.BRUCE LEE, II
Executive Director, California Business League

LEE A. PHELPS
Chairman, Alliance of California Taxpayers

ART PAGDAN, M.D.
National 1st V.P., Filipino-American Political Association

Proposition 140: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure expressly amends the Constitution by amending and adding sections thereof; therefore, new provisions proposed to be inserted or added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. This measure shall be known and may be cited as "The Political Reform Act of 1990."

SEC. 2. Section 1.5 is added to Article IV of the California Constitution, to read:

SEC. 1.5 The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.

The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent.

To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

SEC. 3. Section 2 of Article IV of the California Constitution is amended to read:

SEC. 2. (a) The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years. *No Senator may serve more than 2 terms.*

The Assembly has a membership of 80 members elected for 2-year terms. *No member of the Assembly may serve more than 3 terms.*

Their terms shall commence on the first Monday in December next following their election.

(b) Election of members of the Assembly shall be on the first Tuesday after the first Monday in November of even-numbered years unless otherwise prescribed by the Legislature. Senators shall be elected at the same time and places as members of the Assembly.

(c) A person is ineligible to be a member of the Legislature unless the person is an elector and has been a resident of the legislative district for one year, and a citizen of the United States and a resident of California for 3 years, immediately preceding the election.

(d) When a vacancy occurs in the Legislature the Governor immediately shall call an election to fill the vacancy.

SEC. 4. Section 4.5 is added to Article IV of the California Constitution, to read:

SEC. 4.5. Notwithstanding any other provision of this Constitution or existing law, a person elected to or serving in the Legislature on or after November 1, 1990, shall participate in the Federal Social Security (Retirement, Disability, Health Insurance) Program and the State shall pay only the employer's share of the contribution necessary to such participation. No other pension or retirement benefit shall accrue as a

result of service in the Legislature, such service not being intended as a career occupation. This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law to a person holding or having held office in the Legislature, but upon adoption of this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than Social Security to the extent herein provided.

SEC. 5. Section 7.5 is added to Article IV of the California Constitution, to read:

SEC. 7.5. In the fiscal year immediately following the adoption of this Act, the total aggregate expenditures of the Legislature for the compensation of members and employees of, and the operating expenses and equipment for, the Legislature may not exceed an amount equal to nine hundred fifty thousand dollars ($950,000) per member for that fiscal year or 80 percent of the amount of money expended for those purposes in the preceding fiscal year, whichever is less. For each fiscal year thereafter, the total aggregate expenditures may not exceed an amount equal to that expended for those purposes in the preceding fiscal year, adjusted and compounded by an amount equal to the percentage increase in the appropriations limit for the state established pursuant to Article XIII B.

SEC. 6. Section 2 of Article V of the California Constitution is amended to read:

SEC. 2. The Governor shall be elected every fourth year at the same time and places as members of the Assembly and hold office from the Monday after January 1 following the election until a successor qualifies. The Governor shall be an elector who has been a citizen of the United States and a resident of this State for 5 years

immediately preceding the Governor's election. The Governor may not hold other public office. *No Governor may serve more than 2 terms.*

SEC. 7. Section 11 of Article V of the California Constitution is amended to read:

SEC. 11. The Lieutenant Governor, Attorney General, Controller, Secretary of State, and Treasurer shall be elected at the same time and places and for the same term as the Governor. *No Lieutenant Governor, Attorney General, Controller, Secretary of State, or Treasurer may serve in the same office for more than 2 terms.*

SEC. 8. Section 2 of Article IX of the California Constitution is amended to read:

SEC. 2. A Superintendent of Public Instruction shall be elected by the qualified electors of the State at each gubernatorial election. The Superintendent of Public Instruction shall enter upon the duties of the office on the first Monday after the first day of January next succeeding each gubernatorial election. *No Superintendent of Public Instruction may serve more than 2 terms.*

SEC. 9. Section 17 of Article XIII of the California Constitution is amended to read:

SEC. 17. The Board of Equalization consists of 5 voting members: the Controller and 4 members elected for 4-year terms at gubernatorial elections. The state shall be divided into four Board of Equalization districts with the voters of each district electing one member. *No member may serve more than 2 terms.*

SEC. 10. Section 7 is added to Article XX of the California Constitution, to read:

SEC. 7. The limitations on the number of terms prescribed by Section 2 of Article IV, Sections 2 and 11 of Article V, Section 2 of Article IX, and Section 17 of Article XIII apply only to terms to which persons are elected or appointed on or after November 6, 1990, except that an incumbent Senator whose office is not on the ballot for the general election on that date may serve only one additional term. Those limitations shall not apply to any unexpired term to which a person is elected or appointed if the remainder of the term is less than half of the full term.

SEC. 11. Section 11 (d) is added to Article VII of the California Constitution, to read:

SEC. 11. (a) The Legislators' Retirement System shall not pay any unmodified retirement allowance or its actuarial equivalent to any person who on or after January 1, 1987, entered for the first time any state office for which membership in the Legislators' Retirement System was elective or to any beneficiary or survivor of such a person, which exceeds the higher of (1) the salary receivable by the person currently serving in the office in which the retired person served or (2) the highest salary that was received by the retired person while serving in that office.

(b) The Judges' Retirement System shall not pay any unmodified retirement allowance or its actuarial equivalent to any person who on or after January 1, 1987, entered for the first time any judicial office subject to the Judges' Retirement System or to any beneficiary or survivor of such a person, which exceeds the higher of (1) the salary receivable by the person currently serving in the judicial office in which the retired person served or

(2) the highest salary that was received by the retired person while serving in that judicial office.

(c) The Legislature may define the terms used in this section.

(d) If any part of this measure or the application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications which reasonably can be given effect without the invalid provision or application.